No. 15-1485	
Title:	**District of Columbia, et al., Petitioners** **v.** **Theodore Wesby, et al.**
Docketed:	June 8, 2016
Linked with 15A1050, 16A956	
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Numbers:	(12-7127)
Decision Date:	September 2, 2014
Rehearing Denied:	February 8, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Apr 13 2016	Application (15A1050) to extend the time to file a petition for a writ of certiorari from May 8, 2016 to June 8, 2016, submitted to The Chief Justice.
Apr 13 2016	Application (15A1050) granted by The Chief Justice extending the time to file until June 8, 2016.
Jun 08 2016	Petition for a writ of certiorari filed. (Response due July 8, 2016)
Jun 28 2016	Waiver of right of respondents Theodore Wesby, et al. to respond filed.
Jul 08 2016	Motion for leave to file amicus brief filed by International Municipal Lawyers Association, Inc.
Jul 08 2016	Brief amici curiae of Utah and Seventeen Other States filed.
Jul 13 2016	DISTRIBUTED for Conference of September 26, 2016.
Jul 18 2016	Response Requested. (Due August 17, 2016)
Aug 08 2016	Order extending time to file response to petition to and including September 16, 2016.

Sep 16 2016	Brief of respondents Theodore Wesby, et al. in opposition filed.
Oct 04 2016	Reply of petitioners District of Columbia, et al. filed.
Oct 05 2016	DISTRIBUTED for Conference of October 28, 2016.
Oct 31 2016	DISTRIBUTED for Conference of November 4, 2016.
Nov 07 2016	DISTRIBUTED for Conference of November 10, 2016.
Nov 14 2016	DISTRIBUTED for Conference of November 22, 2016.
Nov 28 2016	DISTRIBUTED for Conference of December 2, 2016.
Dec 05 2016	DISTRIBUTED for Conference of December 9, 2016.
Dec 27 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 09 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 17 2017	DISTRIBUTED for Conference of January 19, 2017.
Jan 19 2017	Motion for leave to file amicus brief filed by International Municipal Lawyers Association, Inc. GRANTED.
Jan 19 2017	Petition GRANTED.
Feb 17 2017	The time to file the joint appendix and petitioners' brief on the merits is extended to and including May 5, 2017.
Feb 17 2017	The time to file respondents' brief on the merits is extended to and including July 12, 2017.
Apr 05 2017	Application (16A956) to extend the time to file a reply brief on the merits from August 11, 2017 to September 1, 2017, submitted to The Chief Justice.
Apr 12 2017	Application (16A956) granted by The Chief Justice extending the time to file the reply brief on the merits until September 1, 2017.
May 05 2017	Joint appendix filed. (Statement of costs filed.)

May 05 2017	Brief of petitioners District of Columbia, et al. filed.
May 11 2017	Brief amici curiae of The National Association of Counties, et al. filed.
May 12 2017	Brief amicus curiae of United States filed.
May 12 2017	Brief amici curiae of Utah and Twenty-Five Other States filed.
May 22 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 12 2017	Brief of respondents Theodore Wesby, et al. filed.
Jul 19 2017	SET FOR ARGUMENT on Wednesday, October 4, 2017.
Jul 19 2017	Brief amici curiae of American Civil Liberties Union, et al. filed.
Aug 01 2017	Record requested from the U.S.C.A. District of Columbia Circuit.
Aug 09 2017	CIRCULATED
Aug 21 2017	Record received from the U.S.C.A. District of Columbia Circuit is electronic and available on PACER with the exception of one restricted document that is electronic.
Aug 25 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 01 2017	Reply of petitioners District of Columbia, et al. filed. (Distributed)
Oct 04 2017	Argued. For petitioners: Todd Kim, Solicitor General, Washington, D. C.; and Robert A. Parker, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Nathaniel P. Garrett, San Francisco, Cal.
Jan 22 2018	Judgment REVERSED and case REMANDED. Thomas, J., delivered the **opinion** of the Court, in which Roberts, C. J., and Kennedy, Breyer, Alito, Kagan, and Gorsuch, JJ., joined. Sotomayor, J., filed an opinion concurring in part and concurring in the judgment. Ginsburg, J., filed an opinion concurring in the judgment in part.

NAME	ADDRESS	PHONE
Attorneys for Petitioners		
Loren L. AliKhan Counsel of Record	D.C. Office of the Attorney General One Judiciary Square 441 4th St., NW, Suite 600 South Washington, DC 20001 loren.alikhan@dc.gov	202-727-6287
Party name: District of Columbia , et al.		
Attorneys for Respondents		
Nathaniel Peardon Garrett Counsel of Record	Jones Day 555 California Street, 26th Floor San Francisco, CA 94104 ngarrett@jonesday.com	415-626-3939
Party name: Theodore Wesby, et al.		
Gregory L. Lattimore	Law Offices of Gregory L. Lattimore, PLLC 1200 G Street, NW Suite 800 Washington, DC 20005	(202) 434-4513
Party name: Theodore Wesby, et al.		
Ted J. Williams	Law Offices of Gregory L. Lattimer, PLLC 1200 G Street, N.W., Suite 800 Washington, DC 20005 lattlaw@aol.com	(202) 434-4513
Party name: Theodore Wesby, et al.		
Other		
Kymberly Kathryn Evanson	Pacifica Law Group, LLP 1191 Second Avenue, Suite 2000 Seattle, WA 98101 Kymberly.evanson@pacificalawgroup.com	206.245.1700
Party name: International Municipal Lawyers Association Inc.		
Noel J. Francisco	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217
Party name: United States		
Tyler R. Green	Solicitor General 350 N. State Street Suite 230, P.O. Box 142320 Salt Lake City, UT 84114-2320	(801) 538-9600

tylergreen@agutah.gov

Party name: Utah and Seventeen other States

John J. Korzen
Wake Forest University School of Law
Appellate Advocacy Clinic
P.O. Box 7206 Reynolda Station
Winston-Salem, NC 27109-7206
(336) 758-5832

korzenjj@wfu.edu

Party name: The National Association of Counties, et al.

Andrew J. Pincus
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

apincus@mayerbrown.com

Party name: American Civil Liberties Union, et al.

RECORD AND BRIEFS

15-1485

Supreme Court, U.S.
FILED
JUN - 8 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

KARL A. RACINE
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

June 8, 2016

QUESTIONS PRESENTED

Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants below, are the District of Columbia and two of its police officers, Andre Parker and Anthony Campanale.

Respondents, who were the appellees below, are Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Antoinette Colbert (as personal representative of the Estate of Ethelbert Louis), Gary Gordon, James Davis, Joseph Mayfield, Jr., Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Jr., and Stanley Richardson.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. Factual Background	3
B. District Court Proceedings	4
C. The Court of Appeals' Opinion	5
D. The Court of Appeals' Denial of Rehearing En Banc	9
REASONS FOR GRANTING THE PETITION	11
I. The District Of Columbia Circuit's Heightened Probable Cause Standard Conflicts With The Standard Employed By Other Courts, And This Court's Fourth Amendment Jurisprudence Generally, On An Important And Recurring Issue	11
A. The court of appeals' heightened probable cause standard deviates markedly from that employed by its sister circuits and state courts	11

TABLE OF CONTENTS—Continued

Page

B. The court of appeals' heightened probable cause standard is contrary to this Court's established Fourth Amendment jurisprudence 17

1. The court of appeals' standard is inconsistent with the "totality of the circumstances" test 17

2. The court of appeals imposed too high a bar for probable cause, contrary to this Court's express warnings 20

C. Whether the probable cause standard allows officers to make reasonable credibility judgments is an important question that officers routinely face 22

II. Even Assuming That Probable Cause Was Lacking, The Court Of Appeals' Decision Contravenes This Court's Precedent On Qualified Immunity Requiring That The Law Be Clearly Established In A Particularized Sense 24

CONCLUSION 29

APPENDIX

APPENDIX A: OPINION, U.S. Court of Appeals for the District of Columbia Circuit (September 2, 2014) 1a

TABLE OF CONTENTS—Continued

Page

APPENDIX B: MEMORANDUM OPINION AND ORDER, U.S. District Court for the District of Columbia (January 18, 2012) 45a

APPENDIX C: ORDER, ON PETITION FOR REHEARING EN BANC, U.S. Court of Appeals for the District of Columbia Circuit (February 8, 2016) 102a

TABLE OF AUTHORITIES

Cases	Page(s)
Adams v. Williams, 407 U.S. 143 (1972)	20, 21
Anderson v. Creighton, 483 U.S. 635 (1987)	25, 28
Artisst v. United States, 554 A.2d 327 (D.C. 1989)	11, 26
Ashcroft v. al-Kidd, 563 U.S. 731 (2011)	28
Baker v. McCollan, 443 U.S. 137 (1979)	22
Bodzin v. City of Dallas, 768 F.2d 723 (5th Cir. 1985)	22-23
Borgman v. Kedley, 646 F.3d 518 (8th Cir. 2011)	23
City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765 (2015)	24
Criss v. Kent, 867 F.2d 259 (6th Cir. 1988)	14, 15, 26
Crockett v. Cumberland Coll., 316 F.3d 571 (6th Cir. 2003)	15
Cox v. Hainey, 391 F.3d 25 (1st Cir. 2004)	21
Finigan v. Marshall, 574 F.3d 57 (2d Cir. 2009)	12, 13, 26

TABLE OF AUTHORITIES—Continued

Page(s)

Florida v. Harris,
133 S. Ct. 1050 (2013) 17, 19, 20

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 24

Hope v. Pelzer,
536 U.S. 730 (2002) 27, 28

Hunter v. Bryant,
502 U.S. 224 (1991) 25

Illinois v. Gates,
462 U.S. 213 (1983) 20, 21

Kaley v. United States,
134 S. Ct. 1090 (2014) 20

Kozlovska v. United States,
30 A.3d 799 (D.C. 2011) 26-27

Marks v. Carmody,
234 F.3d 1006 (7th Cir. 2000) 15, 26

Maryland v. Pringle,
540 U.S. 366 (2003) 19, 21

McGloin v. United States,
232 A.2d 90 (D.C. 1967) 11, 26

Mullenix v. Luna,
136 S. Ct. 305 (2015) 24, 25, 28

Nichols v. Woodward & Lothrop, Inc.,
322 A.2d 283 (D.C. 1974) 16, 27

Plumhoff v. Rickard,
134 S. Ct. 2012 (2014) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Prieto v. May Dep't Stores Co.,
216 A.2d 577 (D.C. 1966) 16, 27

Ramirez v. City of Buena Park,
560 F.3d 1012 (9th Cir. 2009) 15

Reichle v. Howards,
132 S. Ct. 2088 (2012) 24

Royster v. Nichols,
698 F.3d 681 (8th Cir. 2012) 15, 26

Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) 27

Saucier v. Katz,
533 U.S. 194 (2001) 25

Sennett v. United States,
667 F.3d 531 (4th Cir. 2012) 15

Stanton v. Sims,
134 S. Ct. 3 (2013) 24

State v. Newcomb,
20 A.3d 881 (N.H. 2011) 13, 14, 26

Taylor v. Barkes,
135 S. Ct. 2042 (2015) 24

Tillman v. Wash. Metro. Area Transp. Auth., 695 A.2d 94 (D.C. 1997) 16, 27

United States v. Arvizu,
534 U.S. 266 (2002) 18

Wesby v. District of Columbia,
765 F.3d 13 (D.C. Cir. 2014) 1

TABLE OF AUTHORITIES—Continued

Page(s)

Wesby v. District of Columbia,
816 F.3d 96 (D.C. Cir. 2016) 1

Wesby v. District of Columbia,
841 F. Supp. 2d 20 (D.D.C. 2012) 1

Wood v. Moss,
134 S. Ct. 2056 (2014) 24

Wright v. City of Philadelphia,
409 F.3d 595 (3d Cir. 2005) 13, 26

Zimmerman v. Doran,
807 F.3d 178 (7th Cir. 2015) 22

Constitution

U.S. Const. amend. IV ..... *passim*

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

42 U.S.C. § 1983 ..... 1-2, 4, 16

42 U.S.C. § 1988 5

Act of Mar. 3, 1901, ch. 854, § 824, 31 Stat. 1189, 1324 2

D.C. Code § 22-3302 (2008) 2, 20

Other Authorities

75 Am. Jur. 2d *Trespass* (2016) 22

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-44a) is reported at 765 F.3d 13. The order denying rehearing en banc with concurring and dissenting statements (App. 102a-139a) is reported at 816 F.3d 96. The memorandum opinion of the district court granting the respondents' motion for summary judgment (App. 45a-99a) is reported at 841 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. The court of appeals denied a timely petition for rehearing en banc on February 8, 2016. On April 13, 2016, the Chief Justice extended the time for filing this petition for certiorari to and including June 8, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The respondents brought this action under 42 U.S.C. § 1983 alleging that their arrests for trespassing were without probable cause. The Fourth Amendment provides, in relevant part:

> The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ....

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

The District of Columbia's criminal trespass statute provided at the relevant time:

> Any person who, without lawful authority, shall enter, or attempt to enter, any ... private dwelling, building or other property, ... against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor ....

D.C. Code § 22-3302 (2008). This language remained essentially unchanged from the trespass statute that Congress enacted for the District in 1901. *See* Act of Mar. 3, 1901, ch. 854, § 824, 31 Stat. 1189, 1324.

STATEMENT OF THE CASE

This case raises the important and recurring question of when the Fourth Amendment probable cause standard allows police officers to assess a suspect's credibility when he claims an innocent mental state. It also calls for the Court again to correct lower courts when they impose liability on individual law enforcement officers in a manner contrary to this Court's qualified-immunity precedent.

A. Factual Background.

On March 16, 2008, about 1:00 a.m., the District of Columbia Metropolitan Police Department received a complaint from a neighbor about a loud party and possible illegal activities in a house located in an otherwise quiet residential neighborhood. (App. 118a-119a.) The neighbor told police that the property had been "vacant for several months." (App. 119a.)

Officers soon arrived at the home and heard music coming from inside. (App. 119a.) When the uniformed officers knocked and entered, the people inside scattered into other rooms. (App. 119a.) After searching throughout the house, police found 21 persons inside, including a man hiding in a closet. (App. 59a, 119a.) The officers observed activity like that "conducted in strip clubs for profit." (App. 119a.) Several women were "dressed only in their bra and thong with money hanging out [of] their garter belts." (App. 58a.) Officers also smelled marijuana in the home. (App. 53a, 55a.) Consistent with "being a vacant property," the house was in "disarray" and essentially unfurnished. (App. 119a.)

A supervisor, Sergeant Andre Suber, and several other officers, including petitioners Andre Parker and Anthony Campanale, gathered information and interviewed all persons present. (App. 4a-5a.) No one present owned the house, or even knew who the owner was. (App. 119a.) Some told police that they were there for a birthday party, while others said it was a bachelor party. (App. 119a.) No one could identify the guest of honor either way. (App. 119a.) Several said that they had been invited by other people, and some said that a woman identified only as "Peaches" or "Tasty" had given them permission to be in the home.

(App. 119a.) "Peaches," though, was not present. (App. 119a.)

Officers took the time to further investigate. They called "Peaches" on the phone several times but she was "evasive" and repeatedly hung up. (App. 50a.) When an officer asked her to come to the home, she refused, explaining that she would be arrested if she did so. (App. 54a.) "Peaches" told police she had told the partiers that they could use the home. (App. 50a.) She also initially claimed to police that the owner had given her permission to use the home and that she was "possibly renting" it from him. (App. 50a, 54a.) Soon, though, "Peaches" admitted to police that, contrary to her initial claim, she lacked the owner's permission to use the home. (App. 50a.)

Police also spoke with the homeowner, who confirmed that no one, including "Peaches," had permission to be there. (App. 54a.) The homeowner explained that the home had been vacant since the last resident's death. (App. 37a.)

Based on all of this information, Sergeant Suber directed that the partiers be arrested for trespassing. (App. 6a.) Prosecutors later decided not to pursue charges against them. (App. 120a.)

B. District Court Proceedings.

Respondents—16 of the 21 individuals arrested—brought suit in the United States District Court for the District of Columbia, invoking jurisdiction under 28 U.S.C. § 1331. (App. 46a.) They claimed violations of the Fourth Amendment under 42 U.S.C. § 1983 and common-law torts, all based on the alleged lack of probable cause for their arrests. (App. 46a, 63a.) The named defendants included the two petitioner officers,

Parker and Campanale, and the petitioner District of Columbia. (App. 46a.)

After discovery closed, both petitioners and respondents moved for summary judgment. (App. 47a.) The district court granted respondents summary judgment on, *inter alia*, their Fourth Amendment and common-law false arrest claims against petitioners Parker and Campanale. (App. 100a-101a.) It found as a matter of law that the officers lacked probable cause to arrest for trespassing because "nothing about what the police learned at the scene suggests that the [respondents] 'knew or should have known that they were entering against the owner's will.'" (App. 64a (brackets omitted).) The court denied the officers qualified immunity, reasoning that the law was clear that such mental state was required for the offense. (App. 74a.)

After a damages-only trial, the court entered a $680,000 judgment against petitioners Parker and Campanale (and jointly against the petitioner District of Columbia for the common-law torts). (App. 121a & n.4.) It separately ordered petitioners Parker and Campanale to pay the respondents' attorneys' fees under 42 U.S.C. § 1988. (App. 121a.) This brought the total award against the two officers to nearly $1 million. (App. 121a.)

C. The Court of Appeals' Opinion.

A divided panel of the District of Columbia Circuit affirmed the district court's judgment.

The court of appeals found no probable cause for the arrests, applying the same analysis for the Fourth Amendment and common-law false arrest claims. (App. 7a-17a.) It stated that "in the absence of any conflicting information, Peaches' invitation vitiates [a]

necessary element" of trespass: that respondents knew or should have known that their entry was unauthorized. (App. 11a.) The court of appeals explained: "A reasonably prudent officer aware that [respondents] gathered pursuant to an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully." (App. 11a.) According to the court, the homeowner's statement that respondents had entered unlawfully was not "sufficient" for probable cause since the homeowner "never said *that he or anyone else had told* [*respondents*] that they were" unwelcome. (App. 12a.)

The court of appeals rejected as "beside the point" the argument that officers need not "sift through conflicting evidence or resolve issues of credibility." (App. 12a n.4.) It did so because it thought officers did not "observe anything" supporting the mental state required for trespassing. (App. 12a n.4.) The court further explained that there was "no evidence that the officers asked either Peaches or [the homeowner] whether [*respondents*] knew that Peaches had no right to be in the house." (App. 12a n.4.) The court continued: "Had [the officers] asked such questions and gotten an affirmative answer, [then petitioners'] argument would carry weight." (App. 12a n.4.)

The court of appeals also dismissed some of the facts on which the officers relied for probable cause, thus necessarily finding that these facts did not constitute "conflicting information" that would permit officers to doubt the evidence of "Peaches' invitation." (*See* App. 11a.) It explained that "[t]o the extent that people scattered or hid when the police entered the house, such behavior may be 'suggestive' of wrongdoing, but is not sufficient standing alone to create probable cause." (App. 16a.) The court also rejected the view

that the vacant "condition of the house, on its own, should have alerted the [partiers] that they were unwelcome." (App. 16a.) Such condition, the court concluded, was "entirely consistent with" a belief that "Peaches" might be a new tenant. (App. 16a-17a.)

The court of appeals also upheld the denial of qualified immunity. (App. 21a-24a.) It recognized that no case had "invalidated an arrest for [trespassing] under similar circumstances" but held that "that is not the applicable standard." (App. 22a.) Instead, the court explained, it was enough that the law was clearly established in the following respects: that "probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense ... , including any state-of-mind element"; and that the state-of-mind element for trespassing is that a suspect knew or should have known that his entry was unwelcome. (App. 23a.) The court also rejected the officers' defense of privilege on the common-law false arrest claim "for essentially the same reasons" it rejected qualified immunity. (App. 30a.)

Judge Brown dissented, objecting to the "impossible standard for finding probable cause the court [adopted]." (App. 33a.) She explained that the "decision undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden ...." (App. 34a.) This heightened burden, under which "all but the most implausible claims of invitation must be credited," "radically narrows the capacity of officers to use their experience and prudent judgment to assess the credibility of the self-interested statements of [suspects]." (App. 38a.) As Judge Brown noted, the

court's holding is contrary to the "very purpose of a totality of the circumstances inquiry," which is "to allow law enforcement officers to approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism, and decline to give credence to evidence the officers deem unreliable under the circumstances." (App. 38a.)

Judge Brown concluded that the "circumstances surrounding the arrest[s] were sufficient to support the inference that the suspects knew or reasonably should have known their entry was unlawful." (App. 37a.) She cited the following circumstances: the lawful owner had not permitted anyone to enter; the house was vacant and appeared so; the partiers ran and hid from police, gave police conflicting accounts about why they were there, and purported to rely on the invitation of someone who was not present; and when reached by phone, the purported inviter was uncooperative and untruthful with police. (App. 36a-39a.)

Judge Brown additionally opined that qualified immunity applied even if probable cause were lacking. (App. 41a-44a.) As she explained, the law had not previously required "officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims." (App. 43a-44a.) To the extent that pre-existing law was "broadly comparable," Judge Brown concluded that it could reasonably support probable cause here. (App. 43a.)

D. The Court of Appeals' Denial of Rehearing En Banc.

Over a written dissent joined by four Circuit judges, the court of appeals denied rehearing en banc. In a statement concurring in the denial, the panel majority proclaimed that "there is nothing novel about our view." (App. 106a.) It characterized its opinion as recognizing that "so long as there is evidence giving rise to probable cause—even if that evidence is only circumstantial and short of preponderant—officers may lawfully arrest, no matter what a suspect claims in his or her own defense." (App. 106a.) The panel majority also insisted that its opinion recognizes the "important protection" of qualified immunity but "simply finds that a reasonable officer could not conclude, based on the information before *these particular officers*, that there was probable cause." (App. 107a.)

The dissenting statement by Judge Kavanaugh, joined by Judges Henderson, Brown, and Griffith, indicated that petitioners had probable cause to arrest. (App. 122a, 138a.) Judge Kavanaugh opined that, in any event, the petitioner officers were at least entitled to qualified immunity. (App. 122a.) He believed rehearing en banc necessary because "the panel opinion will negatively affect the ability of ... police officers to make on-the-spot credibility judgments that are essential for officers to perform their dangerous jobs and protect the public." (App. 118a.)

Judge Kavanaugh disagreed with the panel opinion's probable cause standard. (App. 125a-126a.) He queried: "In a case like this where the actus reas is complete and the sole issue is the defendant's mens rea ... [,] are police officers always required to believe

the statements of the suspects ... ?" (App. 125a-126a.) Judge Kavanaugh recognized that the panel opinion "seems to say yes, at least for this kind of case." (App. 126a.) He explained that the panel opinion required officers to credit the suspects' statements "in the absence of any conflicting information" and that, under the panel's approach, reasonable doubts about the suspects' credibility "do not count as 'conflicting information.'" (App. 126a.)

Judge Kavanaugh wrote: "The panel opinion's approach is not and has never been the law." (App. 126a.) He noted that police officers "often hear a variety of mens rea-related excuses" from persons apparently engaged in criminal activity. (App. 126a.) In these situations, Judge Kavanaugh explained, "police officers are entitled to make reasonable credibility judgments and to disbelieve protests of innocence from, for example, those holding a smoking gun, or driving a car with a stash of drugs under the seat, or partying late at night with strippers and drugs in a vacant house without the owner or renter present." (App. 126a.) He noted that "[a]lmost every court of appeals has recognized that officers cannot be expectedly to *definitively* resolve difficult mens rea questions in the few moments" available to them. (App. 127a.)

Judge Kavanaugh further recognized that the "panel opinion in this case contravenes ... emphatic Supreme Court directives" in "11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals." (App. 116a-117a.) He explained that the panel opinion "did what the Supreme Court has repeatedly told us not to do: ... created a new rule and then applied that new rule retroactively against the police officers."

(App. 136a.) As he noted, "the most relevant D.C. trespassing cases *supported* arrest in this kind of case." (App. 134a-135a (citing *Artisst v. United States*, 554 A.2d 327, 330 n.1 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967)).) Moreover, it was "crystal clear" that "[n]o decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances." (App. 136a.) Judge Kavanaugh wrote: "Whatever the merits of the panel opinion's new rule—and I think it is divorced from the real world that police officers face on a regular basis—it is still a new rule." (App. 137a.) He concluded: "This should have been a fairly easy case for qualified immunity." (App. 136a.)

REASONS FOR GRANTING THE PETITION

I. The District Of Columbia Circuit's Heightened Probable Cause Standard Conflicts With The Standard Employed By Other Courts, And This Court's Fourth Amendment Jurisprudence Generally, On An Important And Recurring Issue.

A. The court of appeals' heightened probable cause standard deviates markedly from that employed by its sister circuits and state courts.

The District of Columbia Circuit held that a police officer lacks probable cause to arrest intruders for trespassing so long as the intruders claim an innocent state of mind—here, that they were invited by some person not present—unless there is "conflicting information." (App. 11a.) And although the officers here had reasonable circumstantial grounds to doubt the intruders' credibility, the court of appeals held that such grounds do not count as the "conflicting

information" it required for probable cause. (App. 11a-12a & n.4, 126a.) Instead, the panel majority equated "conflicting information" with direct, affirmative proof of a suspect's state of mind, such as a witness statement that the suspect acted with the requisite intent. (App. 12a & n.4, 33a-34a.) Other courts have held otherwise. They have ruled that officers need not accept an apparent trespasser's claim of an innocent state of mind when there is reason to doubt the credibility of the claim—even when that reason is an indirect one, as is often all that could be available.

In *Finigan v. Marshall*, 574 F.3d 57 (2d Cir. 2009), the Second Circuit held that probable cause existed to arrest despite the apparent trespasser's claim that she had a license or privilege to enter. *Id.* at 61-63. There, the officer learned that the suspect entered and took property from her former residence, in which her estranged husband, who had changed the locks, still resided but was away. *Id.* at 60. The suspect informed the officer "that she had legal title to the residence, that she was removing only her own property, and that her divorce attorney told her she could do so." *Id.*

The Second Circuit rejected the argument that the suspect's belief in her right to enter negated the criminal trespass element of a "knowing" unlawful entry and thus defeated probable cause. *Id.* at 63. The court explained that such argument "incorrectly assume[s] that an officer must have proof of each element of a crime and negate any defense before an arrest." *Id.* Even if the "evidence here might not persuade a jury to convict for criminal trespass because of [the suspect's] belief in her right of entry," the court explained that a police officer's function was "to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the

evidence." *Id.* The Second Circuit concluded that the probable cause threshold "was easily met." *Id.*

Similarly, in *Wright v. City of Philadelphia*, 409 F.3d 595 (3d Cir. 2005), the Third Circuit found probable cause to arrest a woman for trespassing even assuming she believed she had a lawful reason for her entry. *Id.* at 602-04. There, the woman entered a house where she had just been sexually assaulted, for the purpose of retrieving her clothes and gathering other items to prove she had been assaulted. *Id.* at 596-97, 602. The Third Circuit recognized that the officers "may have made a mistake" in disbelieving her explanation for her entry. *Id.* at 603. But the court ruled that such mistake was reasonable because some of the items the woman had retrieved were of "little or no evidentiary value" and were not promptly turned over to police. *Id.* The Third Circuit held that her explanation for entering was "not dispositive" of probable cause, which "looks to the totality of the circumstances" and does not require that officers' "determinations of credibility were, in retrospect, accurate." *Id.*

In *State v. Newcomb*, 20 A.3d 881 (N.H. 2011), the New Hampshire Supreme Court found probable cause for the defendant's arrest for trespassing despite his claim that he lacked knowledge his entry was unauthorized. *Id.* at 885-86. There, a police officer saw a truck parked in the driveway of a home whose owner was reportedly out of town. *Id.* at 884. When the officer approached, the defendant yelled something and got into a car. *Id.* The defendant told the officer he had come to the property with the owner's nephew. *Id.* Meanwhile, the nephew came out from behind the truck and explained to the officer that he was moving and planned to leave the truck on his

aunt's property until she returned. *Id.* Both men appeared nervous. *Id.* Speaking to the officer by phone, the owner stated that her nephew knew that he was not allowed on the property. *Id.*

Based on these facts, the New Hampshire Supreme Court found that the officer had "ample evidence suggesting that the defendant knew that he was not allowed on the premises." *Id.* at 885. This was so despite the defendant's suggestion that he was merely the unwitting companion of the owner's nephew. *Id.* at 884-85. The court emphasized that probable cause is a "commonsense rather than technical concept" and "deals with reasonable probabilities upon which officers must act quickly for the protection of society." *Id.* at 885-86.

Moreover, the reasoning in the District of Columbia Circuit's decision extends far beyond the trespassing context. By requiring a police officer to accept a suspect's claim of an innocent state of mind, even when reasonable circumstantial grounds exist to doubt the suspect's credibility, the decision conflicts more broadly with the probable cause standard in many other courts, which hold that officers may make reasonable credibility judgments and need not believe innocent explanations for conduct that otherwise appears criminal. Thus, these courts do not insist upon the type of "conflicting information"—direct, affirmative proof of a suspect's mental state—that the District of Columbia Circuit requires to overcome those explanations and establish probable cause. (*See* App. 11a-12a & n.4, 33a-34a, 126a.)

For example, the Sixth Circuit has held that a police officer "is under no obligation to give any credence to a suspect's story." *Criss v. Kent*, 867 F.2d 259, 263 (6th Cir. 1988). It has further held that a suspect's

"plausible explanation" should not "in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause." *Id.* (finding probable cause despite suspect's innocent explanation for association with stolen property); *accord Crockett v. Cumberland Coll.*, 316 F.3d 571, 581-83 (6th Cir. 2003).

The Seventh Circuit agrees. In *Marks v. Carmody*, 234 F.3d 1006 (7th Cir. 2000), it held that officers did not need to "accept as established the evidence [the suspect] had proffered that tended to show that he did not act with the requisite intent to defraud" since "[i]ssues of mental state and credibility are for judges and juries to decide." *Id.* at 1009. Likewise, the Eighth Circuit has ruled that "[i]t is usually not possible for an officer to be certain about a suspect's state of mind at the time of a criminal act," and an officer "need not rely on an explanation given by the suspect." *Royster v. Nichols*, 698 F.3d 681, 688 (8th Cir. 2012) (finding probable cause despite innocent explanation for leaving restaurant without signing charge for bill).

The Fourth and Ninth Circuits have similarly held that the probable cause standard gives officers latitude to discount innocent explanations for suspicious behavior. *See Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (holding that a suspect's "innocent explanations for his odd behavior cannot eliminate suspicious facts from the probable cause calculus"); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009) ("Rarely will a suspect fail to proffer an innocent explanation for his suspicious behavior. The test is not whether [his] conduct ... is consistent with innocent behavior; [police] officers do

not have to rule out the possibility of innocent behavior." (internal quotation marks omitted)).

Especially problematic for law enforcement officers in the District of Columbia, the District of Columbia Circuit's probable cause standard conflicts with the standard of the District of Columbia Court of Appeals. The latter has held that police are not required to credit a suspect's claim of an innocent mental state. *See Nichols v. Woodward & Lothrop, Inc.*, 322 A.2d 283, 286 (D.C. 1974) (rejecting the contention that "the officer was obliged to believe the explanation of a suspected shoplifter" for suspicious conduct); *Prieto v. May Dep't Stores Co.*, 216 A.2d 577, 578-79 (D.C. 1966) (finding probable cause to arrest for theft where the plaintiff headed toward the clothing store exit with pajamas over her arm, even though the plaintiff told the officer that she had forgotten she had them and the plaintiff had a purse in which she could have concealed them if she had wanted); *see also Tillman v. Wash. Metro. Area Transp. Auth.*, 695 A.2d 94, 95-97 (D.C. 1997) (finding probable cause to arrest for entry of transit station without paying fare despite objective evidence of an innocent mental state).

This case would have been decided differently if it had arisen in these other courts. This Court should resolve the conflict in Fourth Amendment jurisprudence that the District of Columbia Circuit has created. And because all of the respondents' Section 1983 and common-law claims depended on the absence of Fourth Amendment probable cause (App. 7a, 30a, 63a), this Court should reverse all liability findings.

B. The court of appeals' heightened probable cause standard is contrary to this Court's established Fourth Amendment jurisprudence.

The District of Columbia Circuit's heightened probable cause standard—aptly described as an "impossible standard" by Judge Brown (App. 33a)—also contravenes this Court's precedent.

1. The court of appeals' standard is inconsistent with the "totality of the circumstances" test.

Probable cause is "a practical and common-sensical standard" that considers "the totality of the circumstances." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). It rejects "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Id.* Yet the court of appeals' decision mandates that "all but the most implausible claims of invitation be credited" in assessing probable cause to arrest for trespassing. (App. 38a.) This inflexible approach excludes important facts from the probable cause calculus: reasons to doubt a suspect's claim of an innocent state of mind.

Here, an officer had objectively reasonable grounds to discredit the partiers' claimed belief that their entry into the house was authorized. The partiers were in a vacant home late at night, engaging in illicit behavior, without any owner or renter present. (App. 119a.) The partiers scattered and hid when uniformed officers knocked and entered the home. (App. 59a, 119a.) They gave police false and conflicting explanations for what they were doing in the house; they could not get their stories straight about whether they were there for a birthday party or a bachelor party, and they could

not identify the guest of honor. (App. 119a.) Some said they had been invited by other people, while some said that they had been invited by "Peaches" or "Tasty." (App. 119a.) When officers spoke by phone with "Peaches," she claimed that she had invited the partiers, but she was evasive and repeatedly hung up the phone. (App. 50a.) "Peaches" refused to come to the scene because she said she would be arrested. (App. 54a.) She attempted to mislead the police by claiming that she had the owner's authority to be in the home, before finally admitting that she had no such authority. (App. 50a, 54a.)

These facts discredited—and did not require officers to accept—the claim of a bona fide invitation. A reasonable officer could have believed that the partiers and "Peaches," furthering their common enterprise, concocted the alleged invitation either beforehand, anticipating that the partiers' presence might be questioned, or afterwards, once police arrived at the home. It was also reasonable to infer from these facts that, even if "Peaches" had conveyed an "invitation," she did so in a manner that alerted or suggested that she was without actual authority to do so. Alternatively, even if "Peaches" had not so much as hinted to the partiers about her lack of authority, a reasonable officer could infer, from all of the suspicious circumstances that night, that the partiers still knew, or at least should have known, that they were not allowed to be there. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("Th[e] process [of considering the totality of the circumstances] allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them ....").

Under the court of appeals' probable cause standard, these reasonable grounds to doubt the partiers' innocent explanation do not count. (App. 11a-12a & n.4, 126a.) The court of appeals' decision dismissed some of these suspicious facts by viewing them in improper isolation. It explained that the partiers' act of scattering and hiding upon the uniformed officers' arrival is "not sufficient *standing alone* to create probable cause." (App. 16a (emphasis added).) It likewise concluded that the vacant "condition of the house, *on its own*," would not have alerted the partiers that something was amiss. (App. 16a (emphasis added).) Viewing these facts in isolation from each other, and from the other objective bases to discredit the partiers' claim, violated the "totality of the circumstances" test. *Maryland v. Pringle*, 540 U.S. 366, 372 n.2 (2003).

The District of Columbia Circuit concluded that these reasonable credibility doubts are not the kind of "conflicting information" required in its view to overcome the claim of invitation and establish probable cause. (App. 11a.) As its decision makes clear, such "conflicting information" must be direct, affirmative proof, like a witness statement that the partiers had a culpable state of mind. (App. 11a-12a & n.4, 33a-34a, 126a.) This impractical and inflexible evidentiary requirement is the kind of rigid rule that is incompatible with the probable cause standard. *Harris*, 133 S. Ct. at 1055. It ignores this Court's instruction that, in assessing probable cause, courts should consider all of the circumstances. *Id.*

2. The court of appeals imposed too high a bar for probable cause, contrary to this Court's express warnings.

Probable cause "is not a high bar." *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014). It requires only the "k[i]nd of 'fair probability' on which 'reasonable and prudent people, not legal technicians, act.'" *Id.* (brackets omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Probable cause does not require "a prima facie showing" of criminal activity, *Gates*, 462 U.S. at 235, or "the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149 (1972). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence ... have no place in the probable-cause decision." *Harris*, 133 S. Ct. at 1055 (brackets omitted) (quoting *Gates*, 462 U.S. at 235).

The court of appeals' test impermissibly departs from this Court's probable cause threshold. Under this Court's precedents, there was probable cause to believe that the partiers were trespassing. The objective elements of the crime were met: the partiers entered a private house against the will of the lawful owner. D.C. Code § 22-3302. The only element even in question was the state-of-mind element—whether they knew or should have known that their entry was against the owner's will. The officers took the time to investigate this element. They did not ignore the partiers' claim that they had been invited, but repeatedly contacted an uncooperative "Peaches," the alleged inviter. (App. 50a, 54a.) Upon investigation and based on all of the circumstances, a police officer could reasonably discredit the partiers' innocent explanation and infer that the state-of-mind element

was sufficiently satisfied. *See Pringle*, 540 U.S. at 372 (finding probable cause to arrest based on reasonable inference that "any or all three of the [car] occupants had knowledge of, and exercised dominion and control over, the cocaine" found behind a back-seat armrest); *Adams*, 407 U.S. at 148-49 (finding probable cause that suspect's possession of a gun was without a permit based on a reliable informant's tip that suspect had a gun and narcotics).

In holding otherwise, the court of appeals set the bar too high. Whether the partiers offered an explanation for their behavior that was "consistent with" an innocent mental state is not the test. (App. 15a-16a.) "[I]innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Gates*, 462 U.S. at 245 n.13. Even if accepting the innocent explanation would have been reasonable here, so too was drawing the contrary inference that the partiers knew or should have known that they were unwelcome. That is enough for probable cause. *See id.* at 245-46; *see also Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004) ("[T]he practical restraints on police in the field are greater with respect to ascertaining intent and, therefore, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great.").

The court of appeals treated the probable cause determination as if it were the ultimate determination of guilt. Perhaps at a criminal trial, a judge or jury weighing the evidence might have concluded as did the court of appeals: the partiers' entry, though unauthorized, was not culpable. But it is the role of

the judge or jury, not the police officer, to finally determine guilt, including whether the accused acted with the "requisite intent." *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979). Probable cause to arrest requires only a "fair probability" of wrongdoing—a standard met here.

C. Whether the probable cause standard allows officers to make reasonable credibility judgments is an important question that officers routinely face.

This case presents an important and recurring issue: the ability of police officers to make credibility judgments about a suspect's claimed mental state when assessing probable cause to arrest. This Court should correct the court of appeals' deviation from the well-established probable-cause analysis of its sister circuits upholding the ability of officers to make such credibility judgments. The court of appeals' rule limiting this ability will have a severe chilling effect on law enforcement, adversely affecting local and federal officers' everyday ability in the District of Columbia to do their difficult jobs and protect the public.

Police officers routinely confront claims of an innocent mental state regarding apparent trespassing. Under most if not all criminal trespass statutes, a bona fide, reasonable belief in the right to be on the property defeats the mental state requirement. 75 Am. Jur. 2d *Trespass* § 154 (2016). Such a belief might be based on an alleged invitation, as here. Other claims of right might rest on various asserted property interests. *See, e.g.*, *Zimmerman v. Doran*, 807 F.3d 178, 182-84 (7th Cir. 2015) (timber deed). Intruders might also assert a belief that they were on a public right-of-way, not private property. *See, e.g.*, *Bodzin v.*

City of Dallas, 768 F.2d 722, 723-25 (5th Cir. 1985). Alternatively, they might contend that they were simply unaware that their entry was unwelcome. For example, they might claim that they did not see "no trespassing" signs, or misunderstood that a prior owner's objection carried over to a new owner. *See, e.g., Borgman v. Kedley*, 646 F.3d 518, 524 (8th Cir. 2011).

The issue is not limited to trespassing but arises whenever a crime has a mental state requirement. As Judge Kavanaugh explained in voting for rehearing en banc, police officers "often hear a variety of mens rea-related excuses," to wit:

> "The drugs in my locker aren't mine." "I don't know how the loaded gun got under my seat." "I didn't realize the under-aged high school kids in my basement had a keg." "I wasn't looking at child pornography on my computer, I was hacked." ... "I punched my girlfriend in self-defense."

(App. 126a.) At the same time, police often have no witness able, or willing, to attest to the suspect's mental state. Officers must then judge the credibility of such innocent explanations, under difficult and uncertain circumstances, in the short time officers have to decide whether to arrest.

Requiring that officers credit a suspect's claim of an innocent mental state—even when the officer has an objectively reasonable basis to doubt the suspect's credibility—would create an enormous problem for law enforcement. The court of appeals' requirement fails to reflect the real world in which police officers function: one in which they must "approach such ambiguous facts and self-interested or unreliable

statements with an appropriately healthy dose of skepticism." (App. 38a.) The court of appeals' decision undercuts an officer's ability to use his or her experience, judgment, and direct observations to assess the credibility of a suspect's innocent explanation. Officers will second-guess themselves and forgo enforcement of the law, fearing that a judge, far removed from the scene and years later, might make a different credibility judgment and then hold them personally liable.

II. Even Assuming That Probable Cause Was Lacking, The Court Of Appeals' Decision Contravenes This Court's Precedent On Qualified Immunity Requiring That The Law Be Clearly Established In A Particularized Sense.

"Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), and citing *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013); and *Reichle v. Howards*, 132 S. Ct. 2088 (2012)); *accord Taylor v. Barkes*, 135 S. Ct. 2042 (2015); *Mullenix v. Luna*, 136 S. Ct. 305 (2015). It is important that this Court do so again here. The lower courts imposed summary judgment against the two petitioner officers and ordered them to pay nearly $1 million in damages and fees, even though the unconstitutionality of the officers' actions was not clearly established at the time (if it has been established at all). Because the court of appeals denied the officers' defense to the common-law false arrest claim for "essentially the same reasons" as

it denied qualified immunity (App. 30a), this Court should reverse all liability findings.

Qualified immunity applies if "a reasonable officer could have believed [the arrests] to be lawful, in light of clearly established law and the information the arresting officers possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (brackets omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). This Court has "repeatedly told courts ... not to define clearly established law at a high level of generality." *Mullenix*, 136 S. Ct. at 308. Rather, this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation ... the officer confronts.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

Like other courts of appeals that this Court has reversed in recent years, the District of Columbia Circuit failed to follow this Court's clear instructions regarding qualified immunity. It reasoned that the law was clearly established for present purposes, in that: (1) probable cause requires "some evidence" of each offense element, including the mental state requirement; and (2) the mental state requirement for trespassing is whether the person "knew or should have known that his entry was unwanted." (App. 23a.) Assuming that these two generalized propositions were clearly established at the time, this is not the level of specificity this Court requires. These two generalized propositions did not give fair notice to the petitioner officers whether probable cause to arrest existed in the specific situation they confronted:

persons behaving suspiciously inside a vacant home, late at night, where the lawful owner disclaims their right to be there, but the suspects claim that they were invited by someone who is not present and is uncooperative and untruthful with police.

Neither the court of appeals nor the district court cited any case that had found probable cause lacking under even remotely analogous circumstances. Pre-existing case law instead supported the existence of probable cause in this situation. As discussed, other federal and state courts have held (and continue to hold) that probable cause exists to arrest for trespassing, even though the suspect asserted a good-faith claim of right, as long as a reasonable officer could disbelieve the suspect. *See Finigan*, 574 F.3d at 61-63; *Wright*, 409 F.3d at 602-04; *Newcomb*, 20 A.3d at 885-86. The same is true for other offenses when the suspect offers an innocent state-of-mind explanation. *See Criss*, 867 F.2d at 263; *Marks*, 234 F.3d at 1009; *Royster*, 698 F.3d at 688.

Similarly, decisions of the District of Columbia Court of Appeals support (and continue to support) probable cause to arrest for trespassing under similar circumstances. Those decisions have upheld trespassing *convictions* even though the accused had offered an innocent explanation for being on the property. *See McGloin*, 232 A.2d at 91 (upholding conviction of person found in non-public areas of a private apartment building though he told police he was looking for a cat or a friend who lived in the building); *Artisst*, 554 A.2d at 330 & n.1 (upholding conviction even though the accused claimed that he had entered dormitory to buy soccer equipment from a resident and thus lacked the requisite intent); *Kozlovska v. United States*, 30 A.3d 799, 800-03 (D.C.

2011) (upholding conviction of a woman previously barred from a building despite her unrebutted testimony that the superintendent permitted her to use the building, since the factfinder was free to disbelieve her testimony). Because such evidence permits a conviction, a reasonable officer could have concluded here that it satisfied the much lower standard of probable cause.

As discussed, decisions of the District of Columbia Court of Appeals at the time had also found probable cause to arrest despite, as here, a suspect's claim or evidence of an innocent mental state. *Nichols*, 322 A.2d at 285-86 (claim of lack of intent to steal because intent was to return item); *Prieto*, 216 A.2d at 578-79 (claim of lack of intent to steal because continued possession of item was inadvertent); *Tillman*, 695 A.2d at 95-97 (evidence suggesting mistaken entry into restricted area where gate normally demarcating area was missing and suspect promptly turned around). Relying on these cases, a reasonable officer could have believed the respondents' arrests were lawful.

It is "crystal clear" that "[n]o decision prior to the panel opinion here had *prohibited* an arrest under D.C. law in these circumstances." (App. 136a.) The panel opinion acknowledged as much but then declared: "that is not the applicable standard" for qualified immunity. (App. 22a.) Of course, as the panel opinion noted, there is no need that "the very action in question have previously been held unlawful," and officers can violate clearly established law "even in novel factual circumstances." (App. 22a-23a (citing *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002))). But the denial of qualified immunity still

requires that "in light of pre-existing law the unlawfulness [of the officer's actions] must be apparent." *Hope*, 536 U.S. at 739 (quoting *Anderson*, 483 U.S. at 640). In other words, existing precedent must have placed the constitutional question the officers confronted "beyond debate." *Mullenix*, 136 S. Ct. at 308.

Existing precedent did not establish "beyond debate" that probable cause was lacking here. This is far from the "novel" or "obvious" factual situation where general constitutional principles might suffice to give an official fair notice of the unlawfulness of his or her conduct. *Cf. Hope*, 536 U.S. at 734-35 (involving the handcuffing of a prisoner to a hitching post in a painful position for several hours in the hot sun, shirtless, with little water and no bathroom breaks). Police officers often encounter the general type of situation here, where suspects offer innocent state-of-mind explanations for trespassing and other apparent criminal behavior. As discussed, the existing precedent addressing these circumstances supported, not undermined, probable cause. And four judges of the District of Columbia Circuit, considering the facts of this particular case, thought that there *was* probable cause. (App. 122a, 138a.) An officer cannot be deemed "plainly incompetent" for having shared their view. *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011).

As Judge Kavanaugh recognized, the court of appeals' decision "did what the Supreme Court has repeatedly told [the lower courts] not to do: The panel opinion created a new rule and then applied that new rule retroactively against the police officers." (App. 136a.) It is unfair to impose an award of nearly $1 million on the two petitioner officers simply

because they did not—and could not—anticipate the court of appeals' decision here. That decision not only split from the other federal courts of appeals that have considered this constitutional question but also departed sharply from the District of Columbia Court of Appeals cases supporting probable cause to arrest under these circumstances. Given this Court's precedents, this "should have been a fairly easy case for qualified immunity." (App. 136a.) The contravention of those precedents warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE
ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

June 2016

APPENDIX

APPENDIX A

765 F.3d 13; 412 U.S. App. D.C. 246;
2014 U.S. App. LEXIS 16893

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7127

THEODORE WESBY, ET AL.,

Appellees,

v.

DISTRICT OF COLUMBIA, ET AL.,

Appellants,

EDWIN ESPINOSA, OFFICER—METROPOLITAN POLICE DEPARTMENT, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES, ET AL.,

Appellees.

March 27, 2014, Argued
September 2, 2014, Decided

COUNSEL: Carl J. Schifferle, Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellants. With him on the briefs were Irvin B. Nathan, Attorney General, Todd S. Kim, Solicitor General, and Donna M. Murasky, Deputy Solicitor General, at the time the briefs were filed. Loren L. AliKhan, Deputy Solicitor General, entered an appearance.

Gregory L. Lattimer argued the cause and filed the brief for appellees.

JUDGES: Before: BROWN and PILLARD, Circuit Judges, and EDWARDS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge PILLARD. Dissenting opinion filed by Circuit Judge BROWN.

OPINION BY: PILLARD

OPINION

PILLARD, *Circuit Judge*: A group of late-night partygoers responded to a friend's invitation to gather at a home in the District of Columbia. The host had told some friends she was moving into a new place and they should come by for a party. Some of them informally extended the invitation to their own friends, resulting in a group of twenty-one people convening at the house. With the festivities well underway, Metropolitan Police Department ("MPD") officers responded to a neighbor's complaint of illegal activity. When the police arrived, the host was not there. The officers reached her by phone, and then called the person she identified as the property owner, only to discover that the putative host had not finalized any rental agreement and so lacked the right to authorize the soiree. The officers arrested everyone present for unlawful entry. But because it was undisputed that the arresting officers knew the Plaintiffs had been invited to the house by a woman that they reasonably believed to be its lawful occupant, the officers lacked probable cause for the arrest. Nor was there probable cause to arrest for disorderly conduct because the evidence failed to show any disturbance of sufficient magnitude to violate local law. We accordingly affirm the district court's grant of summary judgment to Plaintiffs on the ground that

the arrests violated their clearly established Fourth Amendment rights and District of Columbia law against false arrest. Because the supervising police sergeant at the scene also overstepped clear law in directing the arrests, the district court also correctly held the District of Columbia liable for negligent supervision.

I.

The District of Columbia and two police officers in their individual capacities appeal the district court's liability determinations resulting from the grant of partial summary judgment against them. The court granted partial summary judgment in Plaintiffs' favor because, given the uncontroverted evidence of record regarding the information known to the sergeant and two of the officers at the time of the arrests, no reasonable officer in their shoes could have found probable cause to arrest any of the Plaintiffs. The court's grant of summary judgment was only partial, however, in several ways: First, the court denied Plaintiffs' motion for summary judgment against several other officers in the face of factual disputes about what they knew at the scene; the Plaintiffs then abandoned those claims and the court dismissed them with prejudice. Second, the court granted the Defendants' cross-motion for summary judgment on claims against all of the officers in their official capacities, dismissing those claims, too, with prejudice. Finally, the Plaintiffs' summary judgment motion was limited to liability, leaving remedial determinations to the jury. At a trial on damages, the jury awarded each Plaintiff between $35,000 and $50,000 in compensatory damages. The only questions on this appeal address the validity of the partial summary judgment liability holding.

For purposes of appeal of a grant of a plaintiff's motion for summary judgment, we view the facts in the light most favorable to defendants. In the early morning hours of March 16, 2008, the MPD dispatched officers to investigate a complaint of illegal activities taking place at a house in Washington, D.C. The officers heard loud music as they approached the house and, upon entering, saw people acting in a way they viewed as consistent "with activity being conducted in strip clubs for profit"—several scantily clad women with money tucked into garter belts, in addition to "spectators . . . drinking alcoholic beverages and holding [U.S.] currency in their hands." Some of the guests scattered into other rooms when the police arrived. The parties dispute how fully the house was "furnished," but the police observed at least some folding chairs, a mattress, and working electricity and plumbing.[1]

One of the Defendants-Appellants, Officer Anthony Campanale, took photographs of the scene and, along with other officers, interviewed everyone present to find out what they were doing at the house. The partygoers gave conflicting responses, with some saying they were there for a birthday party and others that the occasion was a bachelor party. Someone told Officer Campanale that a woman referred to as "Peaches" had given them permission to be in the house; others said that they had been invited to the party by another guest. Peaches was not at the house.

---

[1] The record also contains inconsistencies regarding what, if any, contraband the police found. For example, the arrest report says that Officer Parker recovered marijuana inside the house, but he acknowledged in his deposition that he smelled—but did not find—marijuana. Moreover, nothing in the record indicates that any of the officers observed any drug-related activity.

Nobody who was present claimed to live there or could identify who owned the house.

Another Defendant-Appellant, Officer Andre Parker, spoke to a woman who told him that Peaches "was renting the house from the grandson of the owner who had recently passed away and that [the grandson] had given permission for all individuals to be in the house." The woman then used her cell phone to call Peaches. Officer Parker spoke to Peaches, who refused to return to the house because she said she would be arrested if she did. When Officer Parker asked who gave her permission to be at the house, Peaches told Officer Parker that he could "confirm it with the grandson." Officer Parker then used the same phone to call the apparent owner, identified in the record only as Mr. Hughes, who told Officer Parker that he was trying to work out a lease arrangement with Peaches but had yet to do so.[2] Hughes also told Officer Parker that the people in the house did not have his permission to be there that evening.

Sergeant Andre Suber, an MPD supervisor who was acting as the watch commander that night, arrived on the scene after the officers had begun their investigation. The officers briefed Sergeant Suber, including telling him about Parker's conversations with Peaches and Hughes. Sergeant Suber also spoke to Peaches directly by phone. According to Sergeant Suber, Peaches told him that "she was possibly renting the house from the owner who was fixing the house up for her" and that she "gave the people who were inside the place, told them they could have the bachelor party."

---

[2] The record does not make clear how Officer Parker obtained Hughes's contact information or whether, at the time of the arrests, the police had made any independent efforts to verify that Hughes was in fact the owner of the house.

As the police continued to talk to Peaches, she acknowledged that she did not have permission to use the house. On that basis—and notwithstanding the undisputed statements of both the guests and Peaches that she had given them permission to be at the house—Sergeant Suber ordered the officers to arrest everyone for unlawful entry.

After the police arrested and transported the partygoers to the police station, Sergeant Suber and the lieutenant taking over as watch commander discussed the appropriate charges for the Plaintiffs. According to Sergeant Suber, the lieutenant decided to change the charge to disorderly conduct after speaking with a representative from the District of Columbia Attorney General's office. Sergeant Suber disagreed, but the lieutenant overruled him. The officers who had been at the house, including Sergeant Suber, each testified that they had neither seen nor heard anything to justify a disorderly conduct charge.

Sixteen of the arrestees sued five officers for false arrest under 42 U.S.C. § 1983, the officers and the District for false arrest under common law, and the District for negligent supervision. On cross-motions for partial summary judgment as to liability, the district court granted the parties' motions in part and denied both motions on some issues. The court ruled in favor of the Plaintiffs on their claims of false arrest against Officers Parker and Campanale in their individual capacities, and on the common law false arrest and negligent supervision claims against the District. Defendants appeal these liability determinations.

II.

We review de novo a district court's summary judgment ruling, "apply[ing] the same standard of review applicable to the underlying claims in the district court." *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918, 382 U.S. App. D.C. 312 (D.C. Cir. 2008). A party is entitled to summary judgment where, "viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in the nonmoving party's favor," *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 4, 398 U.S. App. D.C. 43 (D.C. Cir. 2011), this Court determines that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

We begin with Plaintiffs' entitlement to summary judgment on their Section 1983 and common-law false arrest claims. Because "[t]he elements of a constitutional claim for false arrest are substantially identical to the elements of a common-law false arrest claim," we address the merits of those claims together. *See Scott v. District of Columbia*, 101 F.3d 748, 753-54, 322 U.S. App. D.C. 75 (D.C. Cir. 1996) (citing *Dellums v. Powell*, 566 F.2d 167, 175, 184 U.S. App. D.C. 275 (D.C. Cir. 1977)). As with most false arrest claims, Plaintiffs' claims "turn on the issue of whether the arresting officer[s] had probable cause to believe that [Plaintiffs] committed a crime." *Id.* at 754. Defendants argue that the district court erred in finding the arrests unsupported by probable cause because, in their view, the officers had objectively valid bases to arrest the Plaintiffs both for unlawful entry and disorderly conduct. In the alternative, Defendants contend that, even if probable cause were lacking, the officers are shielded from liability by qualified

immunity and a common-law privilege. We address these contentions in turn.

A.

The assessment of probable cause is an objective one. An arrest is supported by probable cause if, "at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that the suspect has committed or is committing a crime. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

Based on the undisputed facts relevant to the knowledge the police had at the time of the arrests, and "giv[ing] due weight to inferences drawn" by the officers, we consider de novo whether those facts support a determination of probable cause to arrest. *Ornelas v. United States*, 517 U.S. 690, 697, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). Defendants contend that they were justified in arresting Plaintiffs for unlawful entry and disorderly conduct. To determine whether they had probable cause to believe that Plaintiffs were violating District of Columbia law, we look to District law to identify the elements of each of those offenses. *See Michigan v. DeFillippo*, 443 U.S. 31, 36, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). Upon examination of the relevant statutes and case law, we conclude that no reasonable officer could have concluded that there was probable cause to arrest Plaintiffs for either crime.

Unlawful Entry. At the time of Plaintiffs' arrests, District of Columbia law made it a misdemeanor for a person to, "without lawful authority, . . . enter, or attempt to enter, any public or private dwelling,

building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof." D.C. Code § 22-3302 (2008).[3] To sustain a conviction for unlawful entry, the government must prove that "(1) the accused entered or attempted to enter public or private premises or property; (2) he did so without lawful authority; (3) he did so against the express will of the lawful occupant or owner; and (4) general intent to enter." *Culp v. United States*, 486 A.2d 1174, 1176 (D.C. 1985).

The probable-cause inquiry in this case centers on the third and fourth elements, which together identify the culpable mental state for unlawful entry. *See Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013). Specifically, the question is whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that Plaintiffs knew or should have known they had entered the house "against the will of the lawful occupant or of the person lawfully in charge thereof," and intended to act in the face of that knowledge. D.C. Code § 22-3302; *see Ortberg*, 81 A.3d at 305; *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989).

Probable cause "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). But the police cannot establish probable cause without at least *some* evidence supporting the

---

[3] Both the unlawful-entry statute (D.C. Code § 22-3302) and the disorderly-conduct statute (D.C. Code § 22-1321) have been amended since the events at issue here. Throughout this opinion, we refer to the versions of the statutes in effect during the relevant time period.

elements of a particular offense, including the requisite mental state. *United States v. Christian*, 187 F.3d 663, 667, 337 U.S. App. D.C. 402 (D.C. Cir. 1999). Because the offense of parading without a permit, for example, requires knowledge that no permit issued, "officers who make such an arrest must have reasonable grounds to believe" that the suspects knew no permit had been granted. *Carr v. District of Columbia*, 587 F.3d 401, 410-11, 388 U.S. App. D.C. 332 (D.C. Cir. 2009).

In this case, the officers on the scene had three pieces of information that could bear on whether the Plaintiffs knew or should have known that they had entered a house against the owner's express will. First, the officers had Plaintiffs' statements that they had been invited to some kind of party at the house, with inconsistent and conflicting statements about the type of party. Second, the officers had explicit, uncontroverted statements from Peaches and a guest at the scene that Peaches had told the people inside the house that they could be there. Finally, the officers had a statement by the claimed owner of the house that he had been trying unsuccessfully to arrange a lease with Peaches and that he had not given the people in the house permission to be there.

As a preliminary matter, Defendants argue that Peaches' invitation is irrelevant to the determination of probable cause, because whether the Plaintiffs had a bona fide belief in their right to enter the house "simply raises a defense for the criminal trial." That argument misses the mark. The District of Columbia Court of Appeals recently reiterated that "the existence of a reasonable, good faith belief [in permission to enter] is a valid defense *precisely because it precludes the government from proving what it must*—that a

defendant knew or should have known that his entry was against the will of the lawful occupant." *Ortberg*, 81 A.3d at 309 (emphasis added).

It is true that, if prosecuted for unlawful entry, a defendant may raise as a defense that he entered the building "with a good purpose and with a bona fide belief of his right to enter." *Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971); *see United States v. Thomas*, 444 F.2d 919, 926, 144 U.S. App. D.C. 44 (D.C. Cir. 1971); *Ortberg*, 81 A.3d at 308-09. But the cases interpreting the unlawful-entry statute are clear and consistent that such a defense is available precisely because a person with a good purpose and bona fide belief of her right to enter "lacks the element of criminal intent required" by the statute. *Smith*, 281 A.2d at 439; *see also McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967) (dismissing concern about unintentional violations of the statute, because "one who enters for a good purpose and with a bona fide belief of his right to enter is not guilty of unlawful entry"); *Bowman*, 212 A.2d 610, 611-12 (D.C. 1965) ("[O]ne who enters . . . for a good purpose and with bona fide belief of his right to enter . . . would not be guilty of an unlawful entry . . . .").

Thus, contrary to Defendants' argument, Peaches' invitation is central to our consideration of whether a reasonable officer could have believed that the Plaintiffs had entered the house unlawfully. That is because, in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of Plaintiffs' intent to enter against the will of the lawful owner. A reasonably prudent officer aware that the Plaintiffs gathered pursuant to an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully.

Ignoring the significance of Peaches' invitation, Defendants argue that Hughes's statement that he had not given the Plaintiffs permission to be in the house is dispositive because a homeowner's denial that he has given permission to enter his property is sufficient to establish probable cause to arrest for unlawful entry. We disagree. Importantly, Hughes never said *that he or anyone else had told the Plaintiffs* that they were not welcome in the house. Peaches eventually admitted that *she* did not have permission to be in the house or to invite others, but there is no evidence that she had told the Plaintiffs as much. Indeed, the evidence is uniform that the arrestees all were invited, and there is simply no evidence in the record that they had any reason to think the invitation was invalid. All of the information that the police had gathered by the time of the arrest made clear that Plaintiffs had every reason to think that they had entered the house with the express consent of someone they believed to be the lawful occupant.[4] Accordingly, there was no probable

---

[4] For this reason, Defendants' contention that arresting officers are not required to "sift through conflicting evidence or resolve issues of credibility" is beside the point. Multiple officers on the scene testified that they did not observe anything leading them to believe that the Plaintiffs had any reason to think they lacked the right to be in the house. There is also no evidence that the officers asked either Peaches or Hughes whether the *Plaintiffs* knew that Peaches had no right to be in the house. Had they asked such questions and gotten an affirmative answer, Defendants' argument would carry weight. *See Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2005) (officers entitled to discredit Section 1983 plaintiff's innocent explanation for entry into a house in the face of conflicting evidence); *Dahl v. Holley*, 312 F.3d 1228, 1234 (11th Cir. 2002) (probable cause to make an arrest based on inculpatory statements by a reliable informant, notwithstanding exculpatory statements from the suspect that "tended to discredit [the informant's] version of events").

cause for the officers to believe that the Plaintiffs entered the house knowing that they did so against the will of the owner or occupant.

The cases on which Defendants rely do not compel a different conclusion. Citing to *McGloin*, 232 A.2d 90, and *Culp*, 486 A.2d 1174, Defendants argue that Hughes's statement was sufficient because "[t]he offense of unlawful entry does not require any kind of prior warning in the case of a private dwelling." Br. for Appellants 22. *Culp* and *McGloin* establish that an owner of a private dwelling need not post any sign or warning in order to express an intent to exclude the general public. *See Culp*, 486 A.2d at 1177 (probable cause for unlawful entry where the building is vacant and "the property itself reveals indications of a continued claim of possession by the owner or manager"); *McGloin*, 232 A.2d at 91 ("[S]urely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry."). But those cases do not apply here, because the Plaintiffs did not simply find a house that appealed to them and walk in off the street; they entered the specified home at the invitation of someone they reasonably believed was an authorized inhabitant.

Defendants' reading of *Culp* and *McGloin* would provide probable cause to arrest for unlawful entry any individual in a private dwelling without the express permission of the owner. Such a rule would transform the unlawful-entry statute from one barring entry "against the will of the owner" into one criminalizing entry "without the express invitation of the owner." A brunch host who overstays her lease does not thereby expose her invited guests to arrest for unlawful entry, nor does a person summoned onto

property by a stranger who appears to be the lawful inhabitant commit the crime of unlawful entry if she reasonably fails to recognize that the stranger is not the owner at all, but a traveling salesman. What the unlawful-entry law requires is some showing that the individual entered a place that she knew or should have known she was not entitled to be.

The cases Defendants cite merely recognize that certain factual circumstances not present here make it reasonable to infer an interloper's intent to enter against the will of the owner. *McGloin*, for example, upheld an unlawful-entry conviction where the defendant entered an apartment building, ran up the fire escape and then onto the roof, and said first that he was looking for his cat and then "for a friend named DeWitt who lived in the building," when no one by that name lived there. 232 A.2d at 90. In his defense, McGloin relied on *Bowman*, where the court held that an entry into a semi-public space was not unlawful unless the owner had given an express "warning to keep off," which could be expressed verbally or "by sign." *See McGloin*, 232 A.2d at 91 (quoting *Bowman*, 212 A.2d at 611). Distinguishing *Bowman*, the court emphasized that McGloin entered "not a public or semi-public building," but an apartment building containing four private family dwellings. *Id.* Under such circumstances, it was "more than plain that wandering through the building, climbing on the roof or perching on the fire escape would be against the will of the owner." *Id.*

Culp addressed what inferences the police may reasonably draw when a person enters a property that appears to be vacant. In that case, the police saw three men, including the defendant, inside a "dilapidated" public housing property. *See Culp*, 486 A.2d at 1175.

The men tried to leave through the back door when they saw the police approaching, and the defendant "could not explain his presence" when the officers asked what he was doing there. *Id.* Culp challenged his arrest for unlawful entry on the basis that the police lacked probable cause to believe that he knew he was entering the house against the will of the occupant. *See id.* The court found that the officers had probable cause to arrest Culp because "there were sufficient indications of efforts by [the housing authority] to protect the property against intruders that the officers could reasonably conclude that [Culp] knowingly entered against the will of the person lawfully in charge." *Id.* at 1177 (quotation marks and ellipsis omitted). The housing authority had made "continuous and diligent efforts to board up the house" and at least some of the windows remained boarded up when Culp entered. *Id.*

The arresting officers in this case, unlike those in *McGloin* and *Culp*, observed nothing inconsistent with the reason the Plaintiffs gave for being there—a reason that was corroborated, rather than undermined, by the information that Peaches gave to the officers: Peaches had invited them to her new apartment. Defendants point to the "highly suspicious and incriminating" activities the officers observed in the house to bolster the argument that the officers had no reason to credit the Plaintiffs' explanation for their presence. But the officers acknowledged that, other than the ostensible unlawful entry, they did not see anyone engaging in illegal conduct. Moreover, the activities they did observe—scantily clad women dancing, bills slipped into their garter belts, and people drinking—were consistent with Plaintiffs' explanations that they were there for a bachelor or birthday

party.[5] To the extent that people scattered or hid when the police entered the house, such behavior may be "suggestive" of wrongdoing, but is not sufficient standing alone to create probable cause. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) (noting that unprovoked flight "is not necessarily indicative of wrongdoing," but is suggestive enough that, given other circumstances, may justify further investigation). To the extent that the party involved semi-nude dancing or stripping, it is hardly surprising that participants would retreat as officers entered off the street.

As the district court explained, this is not a case in which "the property was boarded up, door latches were broken, no trespassing signs were posted or the manner of securing the property indicated that the owner wanted others to keep out." *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 33 (D.D.C. 2012). Notwithstanding the parties' dueling characterizations of how furnished and inhabited the house appeared, there is nothing in the record suggesting that the condition of the house, on its own, should have alerted the Plaintiffs that they were unwelcome. To the contrary, that the house had sparse furnishings and functioning utilities was entirely consistent with one individual's statement to Officer Parker that

---

[5] In their brief, Defendants suggest that the evidence "showed that the suspects were using the house for unlawful activities, including drug use and prostitution" and cite to a variety of criminal statutes prohibiting that type of conduct. Br. for Appellants 30. Notably, however, Defendants do not attempt to justify Plaintiffs' arrests on any of those grounds, and entirely ignore that the officers uniformly testified that they did not see any evidence of drugs or similar illegal activity.

Peaches was the new tenant in a house previously occupied by the owner's recently deceased grandfather.

It bears emphasizing that Defendants are incorrect to suggest that our conclusion could render the unlawful-entry statute "unenforceable in most circumstances" or leave the police "powerless to make arrests for unlawful entry" in analogous situations. Br. for Appellants 24. The police were by no means powerless in this case. At a minimum, after speaking with Hughes and determining that he had not given Peaches permission to use the house, the officers could have told the Plaintiffs that they lacked permission to be there and so must leave. Had the officers "personally asked [the Plaintiffs] to leave and [the Plaintiffs] had refused," such a refusal would have supplied the probable cause the officers needed to make an arrest for unlawful entry. *District of Columbia v. Murphy*, 631 A.2d 34, 38 (D.C. 1993); *see id.* at 37 ("The offense of unlawful entry includes . . . cases where a person who has entered the premises with permission subsequently refuses to leave after being asked to do so by someone lawfully in charge.").

In sum, when faced with the facts and circumstances presented in this case—and, in particular, without any evidence that the Plaintiffs knew or should have known they were in the house against the will of the owner or lawful occupant—a reasonable officer could not have believed there was probable cause to arrest the Plaintiffs for unlawful entry.

Disorderly Conduct. Defendants argue in the alternative that the officers had probable cause to arrest the Plaintiffs for disorderly conduct. At the time of the Plaintiffs' arrests, the relevant statute made it a crime to "shout[] or make[] a noise either outside or

inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons," either with the intent "to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby." D.C. Code § 22-1321(3) (2008). The "breach of the peace" clause qualifies the remainder of the statute "and sets forth an essential element of the offense." *In re T.L.*, 996 A.2d 805, 810 (D.C. 2010).

Plaintiffs point to the evidence in the record that the arresting officers themselves did not believe there was evidence to support a disorderly conduct charge. As long as the arresting officers "had an objectively valid ground upon which" to make an arrest, however, the subjective knowledge and intent of the officers is irrelevant. *United States v. Bookhardt*, 277 F.3d 558, 566, 349 U.S. App. D.C. 317 (D.C. Cir. 2002); *see Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Thus, even where police do not believe evidence suffices, or are unsure which of several offenses the suspect may have committed, an arrest is valid so long as, on the facts of which the officers were aware, an objective observer can discern probable cause. *See, e.g.*, *United States v. Broadie*, 452 F.3d 875, 881, 371 U.S. App. D.C. 499 (D.C. Cir. 2006) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004)); *Bookhardt*, 277 F.3d at 566; *United States v. Prandy-Binett*, 995 F.2d 1069, 1073-74, 302 U.S. App. D.C. 1 (D.C. Cir. 1993); *see also Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006) (Sotomayor, J.) ("[W]hen faced with a claim for false arrest, we focus on the validity of the arrest, and not on the validity of each charge."). Defendants are thus correct that the arresting officers' subjective belief that they lacked probable cause to arrest the Plaintiffs for disorderly conduct is not dispositive. What matters

is whether, on the facts the officers knew at the time, a reasonably prudent officer could have found that the Plaintiffs were engaging in disorderly conduct. *See Whren*, 517 U.S. at 813; *Bookhardt*, 277 F.3d at 566.

The officers here, however, accurately estimated the evidence as inadequate to support probable cause to believe that the Plaintiffs' conduct was disorderly. As the district court recognized, some evidence suggested "the police were told of reports of a loud party or loud music and some officers heard loud music upon arrival." *Wesby*, 841 F. Supp. 2d at 34. But Defendants exaggerate the nature and quantum of that evidence as showing that Plaintiffs had "disturbed the tranquility and nighttime slumber of the community residents." Br. for Appellants. The evidence on which Defendants rely shows nothing more than that one neighbor had called to complain about noise that evening.[6] A disorderly conduct violation under District

---

[6] To the extent that the Defendants rely on Officer Campanale's trial testimony, that testimony was not before the district court at summary judgment and therefore is not part of the record on review of the grant of summary judgment. *See Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 374 (6th Cir. 2009); *U.S. East Telecommc'ns, Inc. v. U.S. West Commc'ns Servs., Inc.*, 38 F.3d 1289, 1301 (2d Cir. 1994). On the other hand, to the extent that Defendants refer to statements in the summary judgment record reflecting complaints from neighbors about the noise emanating from the house, such evidence is entitled to our consideration. Plaintiffs object to some of that evidence based on the prohibition against hearsay. *See Greer v. Paulson*, 505 F.3d 1306, 1315, 378 U.S. App. D.C. 295 (D.C. Cir. 2007) ("[S]heer hearsay . . . counts for nothing on summary judgment." (internal quotation marks omitted)). But those statements would not be admitted for their truth (e.g., whether there was in fact loud music) but instead to show what information the officers had about the nature and scope of the disturbance at the time of the arrest. *See Fed. R. Evid.* 801(c); *Royall v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 548 F.3d 137, 145, 383 U.S. App. D.C. 331

of Columbia law requires that an arrestee disturbed a "considerable number of persons" and acted "under circumstances such that a breach of the peace may" have been occasioned by that arrestee's conduct. D.C. Code § 22-1321 (2008); *In re T.L.*, 996 A.2d at 808-09 (concluding that defendant did not create "breach of the peace" within the meaning of the statute despite the fact that "some ten to fifteen people left their town houses" in order to observe the "clamor" that defendant caused by yelling loudly on the street). Even viewing it, as we must, in the light most favorable to the Defendants, the evidence here simply does not rise to that level.[7]

For all of these reasons, we conclude that the officers lacked probable cause to arrest the Plaintiffs for unlawful entry or disorderly conduct.

(D.C. Cir. 2008) (considering, on summary judgment, evidence contested as hearsay on the basis that statements were not offered for the truth of the matter asserted); *see also Draper v. United States*, 358 U.S. 307, 311-12, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959) (rejecting contention that officers may not consider hearsay in probable cause assessment). As our discussion makes clear, however, that evidence is relevant to the legal determination of probable cause. *See, e.g., United States v. Branch*, 545 F.2d 177, 184-85, 178 U.S. App. D.C. 99 (D.C. Cir. 1976) (emphasizing that the probable cause determination in Draper, though based in part on hearsay evidence, was appropriate because that evidence "was explicitly detailed and corroborated by events as they transpired").

[7] Our conclusion that there was insufficient evidence for a reasonable officer to conclude that the noise from the house had disturbed a considerable number of people necessarily forecloses Defendants' argument that "there was probable cause to believe the plaintiffs, as a group, had engaged in disorderly conduct." *See* Br. for Appellants 33 (citing *Carr*, 587 F.3d at 407).

B.

Having concluded that Plaintiffs' arrests were unsupported by probable cause, we must consider whether qualified immunity shields the officers from liability. "An officer is entitled to qualified immunity, despite having engaged in constitutionally deficient conduct, if, in doing so, she did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Brosseau v. Haugen*, 543 U.S. 194, 205, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). If Officers Parker and Campanale had "an objectively reasonable basis for believing that the facts and circumstances surrounding [Plaintiffs'] arrest were sufficient to establish probable cause," *Wardlaw v. Pickett*, 1 F.3d 1297, 1304, 303 U.S. App. D.C. 130 (D.C. Cir. 1993) (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)), they would be immune from Plaintiffs' suit for damages.

As with all cases examining whether a particular right was sufficiently clear, "[w]e begin by establishing the appropriate level of generality at which to analyze the right at issue." *Johnson v. District of Columbia*, 528 F.3d 969, 975, 381 U.S. App. D.C. 351 (D.C. Cir. 2008); *see, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 614-15, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Here, the question is whether, in light of clearly established law and the information that Officers Parker and Campanale had at the time, it was objectively reasonable for them to conclude that there was probable cause to believe Plaintiffs were engaging in either unlawful entry or disorderly conduct. *See Wilson*, 526 U.S. at 615. This inquiry into

the "objective legal reasonableness" of the officers' actions parallels but does not duplicate the reasonableness aspect of the Fourth Amendment probable cause analysis. *See Johnson*, 528 F.3d at 976 (describing the two *Saucier* steps as "distinct but overlapping").

To determine whether the officers "strayed beyond clearly established bounds of lawfulness," *id.*, we look first to "cases of controlling authority," *Youngbey v. March*, 676 F.3d 1114, 1117, 400 U.S. App. D.C. 177 (D.C. Cir. 2012) (quoting *Wilson*, 526 U.S. at 617). It is not enough to reiterate that the Fourth Amendment's restrictions against arrest without probable cause are clearly established; the inquiry must be made more contextually, at a finer level of specificity. At the same time, "[w]e need not identify cases with materially similar facts, but have only to show that the state of the law at the time of the incident gave the officer[s] fair warning" that their particular conduct was unconstitutional. *Johnson*, 528 F.3d at 976 (brackets, ellipsis, and quotation marks omitted).

Turning first to the claim of false arrest for unlawful entry, we conclude that no reasonable officer could have believed there was probable cause to arrest Plaintiffs for entering unlawfully where, as here, there was uncontroverted evidence that Plaintiffs believed they had entered at the invitation of a lawful occupant. Defendants argue that, because no case identified by Plaintiffs had "invalidated an arrest for unlawful entry under similar circumstances," it was not clearly established that arresting Plaintiffs for unlawful entry was unconstitutional. But that is not the applicable standard. Qualified immunity need not be granted every time police act unlawfully in a way that courts have yet to specifically address. *See, e.g., Safford*

Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009) ("To be established clearly, . . . there is no need that the very action in question have previously been held unlawful." (brackets and internal quotation marks omitted)); *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

The law in this jurisdiction has been well established for decades that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest, including any state-of-mind element. *See, e.g.*, *Carr*, 587 F.3d at 410-11; *Christian*, 187 F.3d at 667. Under District of Columbia law, criminal intent is a necessary element of the offense of unlawful entry. A person who has a good purpose and bona fide belief of her right to enter "lacks the element of criminal intent required" to violate the unlawful-entry statute. *Smith*, 281 A.2d at 439. Notwithstanding Defendants' suggestion to the contrary, *see* Oral Arg. Rec. at 5:40-5:52, District of Columbia unlawful-entry law predating the conduct in this case plainly required that a suspect "knew or should have known that his entry was unwanted." *Ortberg*, 81 A.3d at 308 (collecting cases); *see also id.* at 307-08 (explaining that, although "lack[ing] some precision," prior discussions of "the mental states for entry and for doing so 'against the will' of the lawful occupant are both clearly discernible and distinct").

The controlling case law in this jurisdiction therefore made perfectly clear at the time of the events in this case that probable cause required some evidence that

the Plaintiffs knew or should have known that they were entering against the will of the lawful owner. Defendants are simply incorrect to suggest that the officers could not have known that uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry. *See Harlow*, 457 U.S. at 819 ("[A] reasonably competent public official should know the law governing his conduct.").

The same analysis holds true with respect to the clarity of the Fourth Amendment right against false arrest for disorderly conduct. Defendants contend that the law was not clearly established at the time of Plaintiffs' arrests because there was no case law interpreting the specific provision of the statute on which Defendants rely. They correctly point out that the first case from the District of Columbia Court of Appeals interpreting subsection (3) of D.C. Code § 22-1321 was decided after the arrests in this case. *See In re T.L.*, 996 A.2d at 810 ("This is the first prosecution under subsection (3) of the statute that has come to our attention."). But the plain text of that provision requires the disturbance of a "considerable number of persons." D.C. Code § 22-1321(3). Whatever a "considerable number of persons" means, surely it must mean something more than a single individual. And yet there is no evidence in this case that the loud music the officers heard when approaching the house disturbed anyone other than one neighbor who had complained.

Put differently, we believe that the language of the disorderly conduct statute, standing alone, was sufficient to give fair notice that there was no probable cause to make an arrest under these circumstances. We do not doubt, as the *In re T.L.* court acknowledged, that some parts of that provision may "pose their own

interpretive issues." 996 A.2d at 810. That does not mean, however, that distinct elements of the offense were unclear in the absence of case law interpreting the statute. *See United States v. Lanier*, 520 U.S. 259, 266-67, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (analogizing clearly established standard to fair warning principles in the context of criminal prosecutions, and noting that "the touchstone is whether the statute, *either standing alone or as construed*, made it reasonably clear at the relevant time that the defendant's conduct was criminal" (emphasis added)); cf. *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (noting that "the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the *total absence of case law*").

Finally, we reject Defendants' arguments that Officers Parker and Campanale cannot be held liable under Section 1983 because (1) they followed Sergeant Suber's order to arrest the Plaintiffs, and (2) they were not each individually responsible for each of the Plaintiffs' arrests.

An officer is not necessarily entitled to qualified immunity simply because he relies on a supervisor's decision to arrest. In evaluating the objective legal reasonableness of an officer's position for purposes of qualified immunity, approval by a superior officer is "pertinent" but not "dispositive." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1249, 182 L. Ed. 2d 47 (2012); cf. *Malley v. Briggs*, 475 U.S. 335, 345-46, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (rejecting the notion that approval of a warrant by a neutral magistrate automatically establishes qualified immunity,

and requiring instead that the officer exercise his own "reasonable professional judgment"). Defendants argue to the contrary primarily in reliance on *Elkins v. District of Columbia*, 690 F.3d 554, 402 U.S. App. D.C. 247 (D.C. Cir. 2012), in which we held that an inspector from the Historic Preservation Office, a government agency "charged with protecting the city's historic structures," was entitled to qualified immunity for her unlawful seizure of the plaintiff's notebooks. *Id.* at 559, 567-68. *Elkins* held that, although the inspector had been personally involved in the unconstitutional seizure, it was reasonable for her not to know that her actions were unlawful. *See id.* at 568 ("The appropriate question for us to ask is whether it would have been clear to a reasonable official in [the inspector's] situation that seizing [the plaintiff's] notebook was unlawful."). Significantly, the inspector in that case was not a law enforcement officer at all, but "a junior member of the search team present to take pictures in an inspection led by police and her superiors." *Id.* Moreover, the *Elkins* court emphasized in granting qualified immunity that, although the inspector ultimately "relied upon the judgment of her supervisor and the police officer in charge," she did not blindly follow their orders. *Id.* Rather, she first "asked [them] about the permissible scope of the search." *Id.* Based on those and other factors, the court concluded that her actions, "though mistaken, were not unreasonable." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 244, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)).

The circumstances here, unlike in *Elkins*, do not show the officers' unquestioning reliance on Sergeant Suber's arrest order to be reasonable. *See id.* at 569 ("Whether an official's reliance [on her supervisor] is reasonable will always turn on several factors . . . .").

In contrast to the historic preservation investigator in *Elkins*, Officers Parker and Campanale are police officers with the independent authority to make arrests while on patrol. Indeed, had Sergeant Suber not come out to the scene, they would have had to make the arrest determinations on their own. Police officers charged with enforcing the criminal statutes are expected to know the limitations on their authority, *see Harlow*, 457 U.S. at 819, and, as discussed above, a reasonably competent officer faced with the information the officers had gathered in this case should have known that he lacked probable cause to make an arrest.

This is also not a case, like *Elkins* and the decisions cited therein, in which the defendant officers played little or no role in the investigation. *See Elkins*, 690 F.3d at 569 (citing, by way of example, a case in which officers did not play a "key role in the overall investigation"). Here, Officers Parker and Campanale were actively involved in surveying the scene and gathering information regarding the Plaintiffs' knowledge and reason for being in the house, and Officer Parker spoke to both Peaches and Hughes by phone. Both officers, moreover, were aware of the key uncontroverted facts in this case: that Peaches had invited the Plaintiffs to the house, and that the Plaintiffs had no reason to doubt that Peaches had the right to extend such an invitation. Under these circumstances, it was not reasonable for the officers to rely on Sergeant Suber's unlawful decision to arrest the Plaintiffs. Yet another factor present in *Elkins* but missing in this case is that neither Officer Parker nor Officer Campanale raised the question—to Sergeant Suber or anyone else—whether there was evidence that the Plaintiffs knew or should have known that their presence in the house was unauthorized. Indeed, there is no evidence in the

record suggesting that Officer Parker or Officer Campanale in fact disagreed with Sergeant Suber's determination that there was probable cause for an arrest but carried out the arrests because they were under orders to do so.

That the officers were apparently as confused or uninformed about the law as their supervisor does not make it reasonable for them to have arrested the Plaintiffs in reliance on his flawed assessment. Cf. *Malley*, 475 U.S. at 346 n.9 ("The officer . . . cannot excuse his own default by pointing to the greater incompetence of the magistrate."); *Messerschmidt*, 132 S. Ct. at 1252 (Kagan, J., concurring in part and dissenting in part) (2012) ("[W]hat we said in *Malley* about a magistrate's authorization applies still more strongly to the approval of other police officers . . . ."). This Court has never held that qualified immunity permits an officer to escape liability for his unconstitutional conduct simply by invoking the defense that he was "just following orders." *See generally Hobson v. Wilson*, 737 F.2d 1, 67, 237 U.S. App. D.C. 219 (D.C. Cir. 1984) (statement denying petition for rehearing) (per curiam) (rejecting with "no hesitation" the defendants' argument, raised for the first time in petition for rehearing, that the existence of an illegal policy excused low-level government officials from liability). Indeed, "[i]n its most extreme form, this argument amounts to the contention that obedience to higher authority should excuse disobedience to law, no matter how central the law is to the preservation of citizens' rights." *Id.* For good reason, this Court has never adopted such a rule.

That leaves us with the contention that Officers Parker and Campanale cannot be held liable because they did not personally arrest each of the Plaintiffs.

But Defendants' argument misapprehends the applicable legal standard for causation in the Section 1983 context. As this court has recognized, the Plaintiffs were required to "produce evidence 'that each [officer], through [his] own individual actions, has violated the Constitution.'" *Elkins*, 690 F.3d at 564 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). Here, the cause of the group arrest was the investigation and erroneous determination regarding probable cause. Both Officers Parker and Campanale were the hub of that investigation: they gathered evidence, including photographs of the people in the house, and actively participated in questioning the Plaintiffs and other key witnesses such as Hughes and Peaches. *See id.* at 566-68 (assessing whether the evidence showed that the individual officers caused the unlawful seizure, and noting in one instance that the defendant's actions were "instrumental to the seizure"). In this context, that is sufficient to establish causation. *See, e.g.*, *KRL v. Estate of Moore*, 512 F.3d 1184, 1193 (9th Cir. 2008) (denying qualified immunity to an officer who relied on a facially invalid warrant in conducting a search because he played "an integral role in the overall investigation" that led to the issuance of the defective warrant); *Hall v. Shipley*, 932 F.2d 1147, 1154 (6th Cir. 1991) (recognizing general rule that mere presence is insufficient to create liability, but upholding denial of qualified immunity based on record evidence that the officer had been "the prime mover" in obtaining the search warrant and "participated in the search once inside the dwelling" (internal quotation marks omitted)); *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (officers who did not physically perform pat-down but who "remained armed on the premises throughout the entire search"

could be held liable under Section 1983 as "participants rather than bystanders").

Because the common-law privilege Defendants invoke overlaps with but is harder to establish than qualified immunity, the Defendants' argument on that score "fails for essentially the same reasons already set forth." *District of Columbia v. Minor*, 740 A.2d 523, 531 (D.C. 1999) (noting that the standard for common-law privilege "resembles the section 1983 probable cause and qualified immunity standards . . . (with the added clear articulation of the requirement of good faith)"); cf. *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012) (explaining that although the officer "need not demonstrate probable cause in the constitutional sense" for privilege to attach, the officer must show "(1) he or she believed, in good faith, that his or her conduct was lawful, and (2) this belief was reasonable" (brackets and internal quotation marks omitted)). Accordingly, we affirm the district court's judgment insofar as it relates to Plaintiffs' Section 1983 and common-law false arrest claims.

III.

Finally, we address the District's claim that the district court erred in granting summary judgment to the Plaintiffs on their common-law negligent supervision claim. The District makes two arguments in support of its contention that the district court erred. First, the District contends that the negligent supervision claim must fail because the arrests were supported by probable cause, so either the standard of care was met or there was no underlying tort. That argument, however, is foreclosed by our conclusion that the officers lacked probable cause to arrest the Plaintiffs.

Second, the District argues that it was entitled to summary judgment on this claim because the Plaintiffs failed to present expert testimony regarding the standard of care. We disagree. District of Columbia law requires expert testimony only where "the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." *Godfrey v. Iverson*, 559 F.3d 569, 572, 385 U.S. App. D.C. 140 (D.C. Cir. 2009) (quoting *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 433 (D.C. 2000)). Moreover, although the District correctly points out that courts often require expert testimony where the training and supervision of police officers is concerned, *see* Br. for Appellants 43 (citing cases), the fact that the supervising official was on the scene and directed the officers to make the unlawful arrests distinguishes this case from those in which expert testimony has been required. *See Godfrey*, 559 F.3d at 573 (no expert testimony required where "the individual with supervisory authority (Iverson) was *present* when his employee (his personal bodyguard Kane) committed the tortious acts"); *District of Columbia v. Tulin*, 994 A.2d 788, 797 (D.C. 2010) (no expert testimony required where police sergeants were on the scene and authorized arrest without inquiring into "critical information" about the incident).

Indeed, the undisputed facts in this case demonstrate that Sergeant Suber, one of the District's supervisory officials, directed his subordinates to make an arrest that he should have known was unsupported by probable cause. That is sufficient to entitle the Plaintiffs to judgment as a matter of law on their negligent supervision claim. *See Phelan v. City of Mount Rainier*, 805 A.2d 930, 937-38 (D.C. 2002) ("To establish a cause of action for negligent supervision,

a plaintiff must show: that the employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee." (internal quotation marks omitted)).

* * *

For the foregoing reasons, we affirm the district court's judgment.

So ordered.

DISSENT BY: BROWN

DISSENT

BROWN, *Circuit Judge*, dissenting:

The court today articulates a broad new rule—one that essentially removes most species of unlawful entry from the criminal code. Officers must *prove* individuals occupying private property know their entry is unauthorized; otherwise police lack probable cause to make arrests. Moreover, any plausible explanation resolves the question of culpability in the suspects' favor. Thus, unless the property is posted with signs or boarded up and attempts to prevent access have been deliberately breached, *i.e.*, there is direct evidence of unauthorized entry, law enforcement's options are limited to politely asking any putative invitee to leave.

I respectfully dissent.

I

Summary resolution is inappropriate where—as here—the probable cause determination turns on close questions of credibility, as well as the reasonability of inferences regarding culpable states of mind that

officers draw from a complicated factual context. *See Media Gen., Inc. v. Tomlin*, 387 F.3d 865, 871, 363 U.S. App. D.C. 280 (D.C. Cir. 2004) ("[Where] the material facts are susceptible to divergent inferences . . . the [] Court ha[s] no basis upon which to grant summary judgment.").

The Court concludes that, as a matter of law, no reasonably prudent officer could believe Plaintiffs entered unlawfully because the undisputed evidence shows an individual with (illusory) authority invited their entry, vitiating Plaintiffs' formation of the requisite intent. Maj. Op. at 11. Yet the mere presence of an invitation by one with ostensible authority is not dispositive if, under the totality of the circumstances, the officers could still conclude the suspects knew or reasonably should have known their invitation was against the will of the lawful owner. *See Ortberg v. United States*, 81 A.3d at 308 (D.C. 2013). The absence of direct, affirmative proof of a culpable mental state is not the same thing as undisputed evidence of innocence.

The court relies on two primary precedents to raise the bar, but neither *Ortberg v. United States*, 81 A.3d 303 (D.C. 2013) nor *United States v. Christian*, 187 F.3d 663, 337 U.S. App. D.C. 402 (D.C. Cir. 1999) justifies the impossible standard for finding probable cause the court now proposes. Channeling Dr. Frankenstein, the court cobbles together a few recognizable parts to build a grotesque and unnatural whole. In *Ortberg*, the court recognized a bona fide belief in the right to enter as a defense to a charge of unlawful entry. *Ortberg* was not a probable cause case; it confirmed that all elements of unlawful entry, including requisite criminal intent, are necessary to sustain a conviction, while emphasizing that bona fide

belief must have some reasonable basis. It is "not sufficient that an accused merely *claim* a belief of a right to enter." *Id.* at 309, n.12.

United States v. Christian does impose a higher probable cause standard but that case is distinguishable. First, *Christian* involved a specific intent crime. *See generally Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) ("[A]n officer need not have probable cause for every element of an offense[,]. . . however, when specific intent is a required element of the offense, the arresting officer must have probable cause for that element."). Second, *Christian* did not require direct evidence. The court cited *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972), acknowledging that the circumstances surrounding an arrest may support the necessary inference of unlawful possession. *Christian*, 187 F.3d at 667. The problem with the government's argument in *Christian* was not the absence of direct proof of criminal intent, it was the absence of any evidence whatsoever of unlawful possession. "[T]he officers [therefore] lacked probable cause to believe a crime had been committed." *Id.*

Today's decision undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden that the Court declines to specify. The Court's decision broadly extends *Ortberg* and *Christian* to apply standards designed for materially disparate contexts to the probable cause inquiry for general intent crimes. Cf. *Pierce v. United States*, 402 A.2d 1237, 1246 n.2 (D.C. Cir. 1979) ("Sentences out of context rarely mean what they seem to say."). As a result, the Court finds officers may only lawfully arrest suspects

for unlawful entry where the officers have evidence affirmatively proving each element of an offense, including clear proof of what the suspect knew or reasonably should have known. *But* cf. 1 Corinthians 2:11 ("For who knows a person's thoughts except their own spirit within them?"). This is tantamount to an invitation to abuse vacation rentals or houses being marketed for sale or lease where prospective tenants can gain entry and retain or misappropriate a key or a lockbox combination, or leave a point of entry unsecured. Such a heightened threshold is not called for under our precedents. For general intent crimes, "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). The proper inquiry is not whether the element of knowledge was conclusively satisfied; it is instead whether, based on the totality of the circumstances, officers could reasonably believe Plaintiffs committed the offense of unlawful entry.

The Court concludes there was insufficient evidence to support arrest because the evidence that Plaintiffs were invitees was uncontradicted, noting the presence of semi-nude dancing and the semi-furnished state of the home are consistent with Plaintiffs' contentions of their innocent attendance at a party. Maj. Op. at 15-16. A jury might credit Plaintiffs' depiction of events, their claims of innocent reliance upon a credible invitation, and conclude they lacked knowledge of the unlawfulness of their entry. However, for purposes of summary judgment, Plaintiffs' lack of knowledge must not be merely "consistent" with the evidence gathered by the police. Instead, Plaintiffs' lack of knowledge must be the only reasonable inference the officers could draw.

Here the totality of the circumstances could cause reasonable minds to question whether Plaintiffs were as blameless as the attendees of a Sunday brunch whose imprudent host has overstayed her lease. *Contra* Maj. Op. at 13 (finding this case indistinguishable from such a scenario). The officers responded to a call reporting illegal activity in a home at least some residents of the neighborhood knew to be vacant. As the officers entered, the partygoers' first response was to scatter into different rooms or hide. The house's interior was bare and in disarray; beyond fixtures or large appliances, it contained only folding chairs and food, and one room upstairs had a bare mattress and lighted candles—along with "females . . . that had provocative clothing on with money in . . . their garter belt[s]." Parker Dep. 14:12-16.[1]

After rounding up and interviewing the partygoers, the officers found their claim to lawful entry was an invitation from the house's supposed tenant, Peaches, who was "throwing a party." However, Peaches was not actually present when the officers arrived on the scene. The partygoers also gave inconsistent explanations for the party to which they had allegedly been invited. Some claimed to be attending a birthday party while others insisted it was a bachelor's party; in any event, none could identify the guest of honor.

When ultimately reached by telephone, Peaches admitted to inviting various partygoers, and claimed she had permission to enter, an assertion she quickly

---

[1] The Court characterizes such minimalist furnishings as consistent with a new tenant. Maj. Op. at 16. But the sparseness of the house's decor is also consistent with a temporarily unoccupied home; a venue choice that reasonably discerning guests might find somewhat abnormal—though perhaps not conclusively so—for a run-of-the-mill house party.

recanted in a series of conflicting answers she made to investigators before becoming evasive and hanging up. The officers also confirmed from the actual owner that the house had been vacant since its last resident's death, the current owner was attempting to rent the property out, and neither Peaches nor anyone else had the owner's permission to enter or use the premises.

The totality of the evidence does not need to show the officers' beliefs regarding the unlawfulness of Plaintiffs' entry were "correct or more true than false. A practical, nontechnical probability . . . is all that is required." *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983). The surrounding context may not convince a jury to find probable cause. But likewise, taken in the light most favorable to the officers, the facts are not so clear cut that no reasonable officer could believe the partygoers knew or should have known Peaches' invitation was not credible or that their entry into the home was not properly authorized.

This is not a case where officers "turn[ed] a blind eye toward potentially exculpatory evidence in an effort to pin a crime on someone." *Ahlers v. Schebil*, 188 F.3d 365, 372 (6th Cir. 1999). Nor did officers lack "any" evidence Plaintiffs committed the offense of unlawful entry. *See Christian*, 187 F.3d at 667. The circumstances surrounding the arrest were sufficient to support the inference that the suspects knew or reasonably should have known their entry was unlawful.

"[T]he real key . . . [to probable cause] is how [an] observed transaction fits into the totality of the circumstances." *Jefferson v. United States*, 906 A.2d 885, 888 (D.C. 2006) (noting observation of a one-way transfer of an unidentified object can, in some cases,

support probable cause for an unlawful two-way exchange of drugs for money). The officers did not ignore Plaintiffs' potentially exculpatory claims of invitation. *See Fridley v. Horrighs*, 291 F.3d 867, 874-75 (6th Cir. 2002) (officers may not ignore exculpatory facts that tend to negate an element of an offense). Instead, during the course of a fast-moving investigation, officers considered and investigated Plaintiffs' statements, and rendered a determination that their claims of bona fide good faith were insufficiently credible to overcome the surrounding facts and circumstances. *See Minch v. D.C.*, 952 A.2d 929, 937-38 (D.C. 2008) (noting police suspicion was reasonably based on appellant's evasiveness and equivocation, particularly in a fast-moving investigation).

The very purpose of a totality of the circumstances inquiry is to allow law enforcement officers to approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism, and decline to give credence to evidence the officers deem unreliable under the circumstances. *Cf. Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ("In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts."). The Court's holding to the contrary ensures that all but the most implausible claims of invitation must be credited and radically narrows the capacity of officers to use their experience and prudent judgment to assess the credibility of the self-interested statements of intruders who claim to have been "invited" and have not overtly forced their entry into a home.

In light of the facts known to the officers at the time of the arrests, summary judgment is unwarranted on the question of probable cause for unlawful entry. From their investigation, the officers knew the house was an unoccupied private rental dwelling, which would likely not require a sign or express warning forbidding entry. *See McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). They further determined none of the Plaintiffs owned or rented the house; that the property was, in fact, vacant; and the true owner had provided neither the partygoers nor any tenants with permission to enter, *see Culp v. United States*, 486 A.2d 1174, 1177 n.4 (D.C. 1985) ("[T]he arresting officers' knowledge that the property is vacant and closed to the public is material to a determination of probable cause."). Plaintiffs' party was taking place in a home so sparsely furnished as to be consistent with a vacant building; the guests' immediate response to the presence of police was to run and hide, an action suggestive of consciousness of guilt; the partygoers gave conflicting accounts about "why" the party was being held; and they purported to rely on an invitation from a "tenant" who was not actually present. When reached by telephone the "tenant" gave conflicting accounts as to her own permission to access the home, finally admitted she lacked any right to use the house, and—upon further questioning—became evasive and yelled at officers before hanging up.

Based on this evidence, taken in the light most favorable to the officers, a reasonable person could disbelieve Plaintiffs' claim of innocent entry based on a credible invitation. *See Parsons v. U.S.*, 15 A.3d 276, 280 (D.C. 2011) ("[T]he informant's general credibility and the reliability of the information he or she provides are important factors in a probable cause assessment"); *see also United States v. Project on Gov't*

Oversight, 454 F.3d 306, 313, 372 U.S. App. D.C. 110 (D.C. Cir. 2006) ("Evaluation of the credibility of witnesses must be left to the factfinder, and the need to assess the credibility of witnesses is precisely what places this dispute outside the proper realm of summary judgment."). A rational juror could find the officers reasonably believed Plaintiffs either knew, or should have known, Peaches' invitation was unauthorized and that use of the house was not otherwise permissible.

At its fringes probable cause is a nebulous construct. *See Jefferson v. United States*, 906 A.2d 885, 887 (D.C. 2006). ("The probable-cause standard is incapable of precise definition . . . because it deals with probabilities and depends on the totality of the circumstances."). In factually complex circumstances, like the present one, the probable cause inquiry requires weighing the credibility of statements from multiple parties and witnesses, and consideration of the reasonable inferences officers may draw from idiosyncratic facts. Resolution of such a credibility laden and fact specific inquiry is properly reserved for the jury. The Court errs in concluding such a case is appropriate for preliminary resolution at summary judgment. *See George v. Leavitt*, 407 F.3d 405, 413, 366 U.S. App. D.C. 11 (D.C. Cir. 2005) ("[A]t the summary judgment stage, a judge may not make credibility determinations, weigh the evidence, or draw inferences from the facts-these are jury functions, not those of a judge ruling on a motion for summary judgment. . . . Although a jury may ultimately decide to credit the version of the events described by [a defendant] over that offered by [a plaintiff], this is not a basis upon which a court may rest in granting a motion for summary judgment.").

More troubling still, by subverting the appropriate standard for probable cause, the Court effectively excises unlawful entry from the District's criminal code for cases where intruders claim they were invited and have not obviously and forcibly obtained entrance to a currently unoccupied private dwelling. Such a conclusion is not compelled by either our case law or common sense; officers are simply not required to credit the exonerating statements of suspected wrongdoers where the totality of the circumstances suggests such claims should be treated with skepticism.

II

Even assuming Plaintiffs' arrests were not supported by adequate probable cause for unlawful entry, qualified immunity shields the officers from individual liability for Plaintiffs' section 1983 claims because the officers' "conduct [did] not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (emphasis added); *see also DeGraff v. D.C.*, 120 F.3d 298, 302, 326 U.S. App. D.C. 270 (D.C. Cir. 1997) ("[T]he scope of qualified immunity must be evaluated using the [] 'objective reasonableness' criteria.").

For purposes of qualified immunity, "'[c]learly established' . . . means that "[t]he contours of the right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Wilson v. Layne*, 526 U.S. 603, 614-15, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). While, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful," *id.*, courts should nonetheless "examine the asserted right at a relatively high

level of specificity, and on a fact-specific, case-by-case basis," *O'Malley v. City of Flint*, 652 F.3d 662, 668 (6th Cir. 2011). And in reviewing the pre-existing law, the officers' "unlawfulness must be apparent" to support a finding that qualified immunity does not apply. *Wilson*, 526 U.S. at 615; *Wardlaw v. Pickett*, 1 F.3d 1297, 1301, 303 U.S. App. D.C. 130 (D.C. Cir. 1993) (suggesting the "unlawfulness of the defendants [must be] so apparent that no reasonable officer could have believed in the lawfulness of his actions").

Here the pre-existing law of unlawful entry is not so clear that a reasonable officer would have known he lacked probable cause to arrest Plaintiffs. The officers were faced with an unusual factual scenario, not well represented in the controlling case law. The property where Plaintiffs were found was somewhere between an occupied private dwelling and a vacant or abandoned building. The situation the officers encountered rests uneasily between two distinct strands of District law. *Compare McGloin*, 232 A.2d at 91 ("[N]o one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.") *with Culp*, 486 A.2d at 1177 (noting boarded windows gives sufficient warning an abandoned building should not be entered).[2]

Neither line of cases unambiguously controls. The law of unlawful entry for abandoned properties has traditionally dealt with obviously decrepit buildings, *e.g.*, *Culp*, 486 A.2d at 1175 (noting the house was missing a rear door, its windows were shattered, and

---

[2] The Court finds it "important[]" there was no evidence the home's true owner told Plaintiffs they were not welcome. Maj. Op. at 11. It is unclear from the case law, however, such a warning is required for a temporarily unoccupied but not obviously abandoned residence. *See McGloin*, 232 A.2d at 90-91.

the interior was in "shambles"), while unlawful entry of private dwellings has generally dealt with traditionally occupied residences, apartments, or semi-public buildings. *See, e.g.*, *McGloin*, 232 A.2d at 91; *Bowman v. United States*, 212 A.2d 610, 611-12 (D.C. 1963). Neither line of cases encompasses a scenario where individuals claim to be the social guests of a tenant of a (vacant) property to which the tenant has no actual possessory interest—much less a scenario where the putative tenant is herself not present on the scene and refuses to otherwise cooperate with officers' ongoing investigation. Moreover, to the extent the pre-existing law is broadly comparable, a reasonable person could find it supports an officer's finding of probable cause where a trespassers claim of invitation is deemed insufficiently credible. *See*, *e.g.*, *McGloin*, 232 A.2d at 90-91 (upholding the conviction of person found in nonpublic areas of a private apartment building, despite his excuse he was looking for a cat or a friend who lived in the building); *Kozlovska v. United States*, 30 A.3d 799, 800-801 (D.C. 2011) (upholding the conviction of a woman who claimed an employee permitted her to use the building).

Thus, in the absence of pre-existing case law clearly establishing the contours of Plaintiffs' rights, the officers were shielded by qualified immunity when, acting under color of state law, they reasonably arrested plaintiffs for unlawful entry. The case law of course requires officers to have some evidence the alleged trespassers committed the offense of unlawful entry. *See* Maj. Op. at 21-22. Yet nothing in the District's law requires officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such

level of specificity, and on a fact-specific, case-by-case basis," *O'Malley v. City of Flint*, 652 F.3d 662, 668 (6th Cir. 2011). And in reviewing the pre-existing law, the officers' "unlawfulness must be apparent" to support a finding that qualified immunity does not apply. *Wilson*, 526 U.S. at 615; *Wardlaw v. Pickett*, 1 F.3d 1297, 1301, 303 U.S. App. D.C. 130 (D.C. Cir. 1993) (suggesting the "unlawfulness of the defendants [must be] so apparent that no reasonable officer could have believed in the lawfulness of his actions").

Here the pre-existing law of unlawful entry is not so clear that a reasonable officer would have known he lacked probable cause to arrest Plaintiffs. The officers were faced with an unusual factual scenario, not well represented in the controlling case law. The property where Plaintiffs were found was somewhere between an occupied private dwelling and a vacant or abandoned building. The situation the officers encountered rests uneasily between two distinct strands of District law. *Compare McGloin*, 232 A.2d at 91 ("[N]o one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.") *with Culp*, 486 A.2d at 1177 (noting boarded windows gives sufficient warning an abandoned building should not be entered).[2]

Neither line of cases unambiguously controls. The law of unlawful entry for abandoned properties has traditionally dealt with obviously decrepit buildings, *e.g.*, *Culp*, 486 A.2d at 1175 (noting the house was missing a rear door, its windows were shattered, and

---

[2] The Court finds it "important[]" there was no evidence the home's true owner told Plaintiffs they were not welcome. Maj. Op. at 11. It is unclear from the case law, however, such a warning is required for a temporarily unoccupied but not obviously abandoned residence. *See McGloin*, 232 A.2d at 90-91.

the interior was in "shambles"), while unlawful entry of private dwellings has generally dealt with traditionally occupied residences, apartments, or semi-public buildings. *See, e.g.*, *McGloin*, 232 A.2d at 91; *Bowman v. United States*, 212 A.2d 610, 611-12 (D.C. 1963). Neither line of cases encompasses a scenario where individuals claim to be the social guests of a tenant of a (vacant) property to which the tenant has no actual possessory interest—much less a scenario where the putative tenant is herself not present on the scene and refuses to otherwise cooperate with officers' ongoing investigation. Moreover, to the extent the pre-existing law is broadly comparable, a reasonable person could find it supports an officer's finding of probable cause where a trespassers claim of invitation is deemed insufficiently credible. *See, e.g.*, *McGloin*, 232 A.2d at 90-91 (upholding the conviction of person found in nonpublic areas of a private apartment building, despite his excuse he was looking for a cat or a friend who lived in the building); *Kozlovska v. United States*, 30 A.3d 799, 800-801 (D.C. 2011) (upholding the conviction of a woman who claimed an employee permitted her to use the building).

Thus, in the absence of pre-existing case law clearly establishing the contours of Plaintiffs' rights, the officers were shielded by qualified immunity when, acting under color of state law, they reasonably arrested plaintiffs for unlawful entry. The case law of course requires officers to have some evidence the alleged trespassers committed the offense of unlawful entry. *See* Maj. Op. at 21-22. Yet nothing in the District's law requires officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such

claims. The officers were therefore entitled to the protection of qualified immunity and the "breathing room" it gives them to make reasonable—albeit potentially mistaken—judgments under novel circumstances unexplored by the law when they took the challenged action. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149 (2011).

APPENDIX B

841 F. Supp. 2d 20;
2012 U.S. Dist. LEXIS 5680

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 9-cv-501 (RLW)

THEODORE WESBY, ET AL.,

Plaintiffs,

vs.

DISTRICT OF COLUMBIA, ET AL.,

Defendants.

January 18, 2012, Decided
January 18, 2012, Filed

COUNSEL: For Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Ethelbert Louis, Gary Gordon, James Davis, Joseph Mayfield, Jr., Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Jr., Stanley Richardson, Plaintiffs: Gregory L. Lattimer, Lead Attorney, Law Offices Of Gregory L. Lattimer, PLLC, Washington, DC.

For District Of Columbia, Edwin Espinosa, Officer - Metropolitan Police Department, in both his official and individual capacities, J. Newman, Officer - Metropolitan Police Department, in both his official

and individual capacities, A. Campanale, Officer - Metropolitan Police Department, in both his official and individual capacities, Andre Parker, Officer - Metropolitan Police Department, in both his official and individual capacities, Faraz Khan, Officer - Metropolitan Police Department, in both his official and individual capacities, Defendants: Denise J. Baker, Lead Attorney, Office of the Attorney General for District of Columbia, Civil Litigation, Washington, DC.

JUDGES: Robert L. Wilkins, United States District Judge.

OPINION BY: Robert L. Wilkins

MEMORANDUM OPINION

In the present action, sixteen Plaintiffs bring claims against the District of Columbia and five officers (Edwin Espinosa, Jason Newman, Anthony Campanale, Andre Parker and Faraz Khan) of the District of Columbia Metropolitan Police Department ("MPD"). (Doc. 1, Compl. ¶¶ 19-24.) In Count I of the complaint, Plaintiffs bring a civil rights false arrest claim pursuant to 42 U.S.C. § 1983 ("Section 1983") against the five officers in their individual capacities.[1] In Count II, Plaintiffs assert a state common law claim for false arrest against the five officers, and also against the District of Columbia ("District") on the basis of *respondeat superior*. Count III alleges negligent supervision solely against the District.

---

[1] Plaintiffs originally brought the Section 1983 claim against the officers in their official capacities as well, but Plaintiffs have now clarified that they are proceeding against the officers solely in their individual capacities. (Doc. 33, Pls.' Summ. J. Response 4.) Therefore, all of Plaintiffs' Section 1983 official capacity claims will be dismissed with prejudice.

Presently before the Court are cross motions for summary judgment. The Defendants seek summary judgment on all claims. (Doc. 31.) Plaintiffs likewise seek summary judgment on all claims. (Doc. 25.)[2]

For the reasons set forth below, the Court finds that both motions are due to be granted in part and denied in part.

I. FACTS

A. Overview

The overall facts are generally undisputed. In the early morning hours of Saturday, March 15, 2008, Plaintiffs were attending a gathering at 115 Anacostia Avenue, N.E., in Washington, D.C.[3] At approximately 1:30 a.m., officers from the D.C. Metropolitan Police Department (MPD) arrived at the house in response to a call about the property. The officers entered the

---

[2] The electronic docket entries for Plaintiffs' pleadings in opposition to Defendants' motion and in support of Plaintiffs' motion specifically list some, but not all, of the sixteen Plaintiffs. (*See* Doc. 25, 32.) Defendants therefore seek dismissal of all claims asserted by the Plaintiffs who were not listed on the electronic docket. While it would have been preferable if Plaintiffs had addressed this issue in their briefs, the Court is not willing to dismiss the claims asserted by some Plaintiffs based solely on notations that appear on the electronic docket, particularly since the text of Plaintiffs' pleadings indicate that they were filed on behalf of all Plaintiffs, Plaintiffs' arguments are not specifically tailored to each individual Plaintiff, and the Defendants cite no rule or precedent indicating that the failure to list every Plaintiff in the text of the electronic docket entry justifies such drastic relief.

[3] Although the complaint, (Compl. ¶ 25), and Defendants' undisputed facts, (Defs' Statement of Facts #8), indicate that the property was located on "Anacostia Road," the police report and property records indicate that the property is located on "Anacostia Avenue." (Defs.' Exs. A, E.)

residence and spoke to the Plaintiffs, an assortment of twenty-one men and women (sixteen of whom are Plaintiffs in this action). Several of the women were scantily dressed and had currency tucked into their garments. None of the Plaintiffs owned the home, but one or more of the Plaintiffs informed one or more of the police officers that a woman named "Peaches"[4] had invited the Plaintiffs to the house for a bachelor party. When an officer spoke to Peaches via telephone, she indicated she had given the Plaintiffs permission to hold a bachelor party at the house. However, the officer later spoke to the purported owner of the home and he indicated that, while he had discussed leasing the property to Peaches, she did not have a lease for the property and that the Plaintiffs did not have his permission to be in the house.

At some point during the investigation, Sergeant Suber arrived at the house and took control of the situation. Upon learning that Peaches did not have permission from the owner to occupy the property, Sgt. Suber made the decision to arrest the Plaintiffs for unlawful entry.[5] Suber is not a defendant in this action.

After Plaintiffs were taken to the police station, they were eventually released at the direction of the watch commander, Lieutenant Netter, who disagreed with Suber's decision regarding the unlawful entry arrests. Before the Plaintiffs could depart, however, Netter ordered the arrest of Plaintiffs for disorderly conduct[6] for using "loud voices," based on advice or direction

---

[4] Apparently Peaches also goes by the name "Tasty." (*See* Doc. 31, Defs.' Summ. J. Br. 6; Hunt Dep. 8-9; Chittams Dep. 11-12.)

[5] *See* D.C. Code § 22-3302.

[6] *See* D.C. Code § 22-1321.

from a representative of the District of Columbia Office of the Attorney General ("Attorney General" or "OAG"). Neither Lieutenant Netter nor the attorney from the OAG have been named as Defendants in this action.

Although Suber objected and informed Netter that the disorderly conduct charge was not appropriate, Netter failed to reverse his decision. Suber and the other officers who were at the scene have since testified that they did not observe any activities consistent with a disorderly conduct charge. Between the time spent detained at the house, at the police station, and in lock up on the disorderly conduct charges, each Plaintiff was in police custody a total of several hours. The disorderly conduct charges were later dropped as to each Plaintiff.

That was a summary. Because the role of each officer, the reasonableness of each officers' actions, the state of the collective knowledge of the officers, and other particularized issues have been raised, set forth below are more detailed descriptions of the evidence from the accounts of several key police officer witnesses and an arrest report.

B. Sergeant Andre Suber

Sergeant Suber admits he made the decision to arrest the Plaintiffs for unlawful entry on the night in question. (Suber Dep. 24.) After some of the officers had already entered the property, Sergeant Suber arrived at the scene and entered the house, which had working electricity. (Suber Dep. 11.) In the course of his debriefing, he asked the officers if the owner of the property was on the scene and they said no. (Suber Dep. 17.) He then asked those present if someone was renting the house and "they" began to tell him about

Peaches who "claimed to be renting the house," but no one present could provide proof of such rental and Peaches was not on the scene. (*Id.* 17.) Suber then asked who gave the Plaintiffs permission to entertain at the house and "no one at the location could provide [him] a name or number of an owner. They only gave a name of . . . Peaches." (*Id.* 18.) Suber further testified:

> A: We called Peaches several times on the phone, a female. We asked her, "Who gave you permission to be inside this house?" She said no one. She said she was possibly renting the house from the owner who was fixing the house up for her. *And that she gave the people who were inside the place, told them they could have the bachelor party.*
>
> . . . .
>
> I asked her again who gave her permission to give them permission to come into an establishment or house that's not under her control. The [sic] she became evasive and hung up the phone.
>
> . . . .
>
> I called her back. She again began yelling and saying she had permission—she didn't know the owner's name, but she had permission to be inside the residence because she was going to rent the place out. Then she hung up. . . . [We got her on the telephone again and] she stated that she didn't have permission to be inside the location. *At that time they all were there unlawfully.*
>
> Q. So she told them that they could be there right?

A. Yes.

Q. Okay. And then you all determined that she didn't have the right to tell them that they could be there right?

A. Yes, sir.

Q. And then because she told them—gave them misinformation, you then arrested the people who thought they had a legal right to be there?

A. If a person comes to a location, it's upon them, their responsibility, to find out if they can in fact be at the residence lawfully.

. . . .

Q. *And it did not matter whether or not they believed, based on what Peaches told them, that they had a right to be there?*

A. *Peaches nor the other individuals occupying that location did not have the right to be there.*

(*Id.* 18-19, 39) (emphasis added).

Around the time of the arrests Suber apparently informed the night watch commander, who was at another location, about the course of events and she was "okay" with his "decision" to arrest Plaintiffs for unlawful entry. (Suber Dep. 31.) Around 5:00 a.m., the next watch commander, Lieutenant Netter, came on duty at the precinct. (*Id.* 28, 31.) While the order of events is somewhat unclear, Netter consulted with other upper level officers and decided he was going to release the Plaintiffs, to which Suber responded by providing Netter with the unlawful entry statute. (*Id.* 28-29.) Netter decided "he didn't care, and that he was

going to release these people," to which Suber responded "You're the watch commander, I'm a sergeant, you have that authority and I don't." (*Id.* 28-29, 39-40.)

At some juncture, Netter again consulted with two other upper level officers and they telephoned the Attorney General's office. (Suber Dep. 40-41.) As the Plaintiffs were being released and were getting their belongings from the front counter, Suber is told that someone from the Attorney General's office said "Lock them up for disorderly conduct, loud voices." (*Id.* 29-30, 41.)

Suber, however, was of the opinion that the disorderly conduct charge did not fit the circumstances because "you can't be disorderly inside of a house" and there was no evidence that the Plaintiffs had become loud or boisterous causing people to wake up, turn on their lights, and/or come outside to investigate a commotion. (*Id.* 42-43.) Although the details of the entire conversation are not in the record, Suber testified he told Netter that the disorderly conduct charge was not "an appropriate charge," but Netter indicated that as watch commander he was going to charge the Plaintiffs. (*Id.* 42-43.) Suber walked out and the Plaintiffs were then gathered and processed for disorderly conduct. (*Id.* 43, 30.)

C. Defendant Officer Andre Parker

At one point in Officer Parker's deposition, he testified that prior to his arrival at the scene a call went out for assistance at the house because "there was some unlawful people inside of this home." (Parker Dep. 10.) At another point he testified

> there was a call. The call that came out was for a loud party at the location. And there had

> been like previous calls to that house that there were some—I mean, I've heard officers have talked about that there was some—a lot of partying going on at this particular location over course of time [sic].

(Parker Dep. 11.) Parker further testified that the person who called the precinct indicated there was illegal activity going on at the house and this information was passed on to the officers. (Parker Dep. 17.) At some point, he was told the "house was due to be vacant. It was a vacant home. And no one had permission to be there." (*Id.* 11.)

Once he entered the house, he observed individuals holding cups and he went upstairs where he observed women dressed "provocatively" with money in their garters. (Parker Dep. 14.) He also smelled marijuana and searched for illegal narcotics, but did not find any illegal narcotics and observed no illegal activity. (Parker Dep. 14-15, 17, 20.) Inside the house Parker observed a mattress, along with lighted candles, but testified he did not see "any furniture." (Parker Dep. 14-15.)

While the officers were investigating the scene, all of the "individuals were asked who the owner of the house was and where the owner was." (Parker Interrog. 2.) One of the Plaintiffs told Parker "that her friend Peaches had allowed her—Peaches was throwing the party," but Peaches was not at the residence. (Parker Dep. 15-16.) Either this same Plaintiff or one of the other Plaintiffs also told Parker that Peaches was renting the house from the grandson of the owner, who had recently passed away, and that the grandson had given permission for the individuals to entertain in the house. (Parker Interrog. 2.)

Parker asked one of the Plaintiffs to get Peaches on the telephone and to ask her to come back to the house to clear things up by bringing "a lease or something." (Parker Dep. 15-16.) Eventually, Parker spoke to Peaches and she told him that she had just left the house and that she would not return because she was afraid of being arrested. (Parker Interrog. 3.) Peaches did indicate that the grandson of the owner had given her permission to occupy the property and that Parker could confirm this. (Parker Interrog. 3.) Parker then spoke to "Hughes,"[7] who told Parker nobody had permission to be in the house. (Parker Dep. 17-18; Parker Interrog. 2.) Hughes indicated he and Peaches were in the process of working out a leasing arrangement, but they never reached an agreement. (Parker Dep. 17-18.)

Upon learning of this information, Sergeant Suber made the decision to arrest Plaintiffs for unlawful entry. (Parker Dep. 18-19.) When asked if he was familiar with the law regarding unlawful entry at the time of the arrests, Parker responded "Yes." (Parker Dep. 31.) He testified the arrests were made because Peaches was reluctant to come back and "[b]ecause one person said they didn't have the right, and one person said they did have the right." (Parker Dep. 19, 31-32.) "It was stated that because it was not clear who the owner of the house was and whether or not permission was given to the individuals to be in the house at the

---

[7] Defendants have introduced property records indicating that a Henry Hughes Jr. owned the house until his death in April 2007, about one year prior to the arrests. (Defs.' Ex. E.) Damion Hughes was the personal representative of the decedent at the time of the arrests, and he sold the property about six months after the arrests. *Id.*

time of the occurrence Sergeant Suber ordered that all the individuals be arrested." (Parker Interrog. 2.)

Parker testified that he did not place anyone under arrest or complete any of the paperwork. (Parker Dep. 20.) He did, however, provide the information he obtained from Peaches and Hughes "to the officers that took [the] arrest." (Parker Dep. 20.) In one of his interrogatory responses he indicates he does not know who arrested the Plaintiffs, but in another interrogatory response he recalls that Officers Khan and Newman made arrests. (Parker Interrog. 12, 20.) There were other officers at the scene, but he does not recall all of their names. (Parker Interrog. 5, 12; Parker Dep. 13.)

Parker did not observe anything at the scene that constituted disorderly conduct. (Parker Dep. 32, 34.)

D. Defendant Officer Anthony Campanale

Officer Anthony Campanale and Officer Parker were on patrol the night of the arrests when they received a call from Officer Jarboe who indicated "there were people in a house at 115 Anacostia Avenue, NE." (Defs. Ex. P, Campanale Interrog. 2.) Upon arriving at the house, Officer Jarboe told Campanale and Parker that "the people in the house should not be there. He also told [them] that he had received information from neighbors that this was an ongoing problem. Officer Jarboe further stated that the neighbors had advised him that the house was abandoned and nobody should be in it." (*Id.*) After entering the house, Campanale observed some individuals holding cups of liquor and beer and he could smell marijuana. (*Id.*) He "also observed female [sic] provocatively dressed with dollar bills in a garter belt around their leg." (*Id.*)

Campanale began taking pictures, during which time Sergeant Suber arrived. (Campanale Interrog. 2.) When the occupants were asked who gave them permission to be in the house, plaintiff Natasha Chittams indicated "Peaches" gave them permission. (*Id.*) Later, Campanale was informed by Officer Parker that he spoke to Peaches. (Campanale Dep. 35; Campanale Interrog. 2.) Officer Parker told Campanale that, although Peaches allegedly had permission to use the residence, she could not return to the scene and could not identify the owner. (Campanale Dep. 35; Campanale Interrog. 2.) Further, Campanale observed that none of the other occupants "could say who gave them permission to be in the house." (Campanale Interrog. 2.) Instead, they said they were present at the "invitation of somebody else." (Campanale Interrog. 9.)

In his interrogatory responses, Campanale explains that "individuals were handcuffed and arrested for unlawful entry," but he does not know who did so. (Campanale Interrog. 19-20.) In his deposition, however, he says he arrested someone for unlawful entry because they did not have permission to be inside the residence, but he does not remember who he arrested or whether the individual was male or female. (Campanale Dep. 35, 37.) When asked how he made the unlawful entry determination, Campanale testified that Officer Parker told Campanale and Sergeant Suber about Parker's conversation with Peaches. (Campanale Dep. 35.) Based on that information, "we believed we had probable cause to place the individuals under arrest for unlawful entry. Nobody could determine who was supposed to be inside the residence." (*Id.*) When asked his understanding of what constitutes unlawful entry, he replied "you're present inside of a location that you do

not have permission to be in." (*Id.* 35.) Later, he gave his arrest reports to Officer Phifer because the officers "were at check-off point," and the supervisors were not allowing the officers to "stay past [their] tour." (*Id.* 41.)

Campanale did not observe any conduct that would support a charge of disorderly conduct. (Campanale Dep. 41-42.) According to Campanale, the other four defendants were at the scene along with other officers. (Campanale Interrog. 5.)

E. Defendant Officer Edwin Espinosa

On the night of the arrests, Espinosa was partnered with his training officer, Master Patrol Officer Gregory Phifer, who had a conversation with Officer David Jarboe. (Espinosa Interrog. 2.) Espinosa does not know the substance of the conversation, but he and Phifer left the precinct and drove to the house. (*Id.*) Although the arrest report indicates Espinosa heard "loud music" prior to entering the house, when asked to give a statement of facts surrounding the arrest of Plaintiffs, Espinosa's interrogatory responses make no mention of hearing music, much less loud music. (Espinosa Interrog. 2.) Upon entering the house, he did not observe any illegal activity. (Espinosa Dep. 11.) The Plaintiffs were asked "if there was an owner to the apartment or to that residence," and when that question was not answered, Officers Phifer and Jarboe tried to determine if anyone knew the owner and the Plaintiffs "came up with no answer." (Espinosa Dep. 11-12.) Espinosa does not know who made the decision to arrest the Plaintiffs or who actually arrested them, but he did not question, search, detain or handcuff any of the individuals or tell them they were under arrest. (Espinosa Dep. 12; Espinosa Interrog. 2, 16, 20.)

He and Officer Phifer later returned to the precinct where Espinosa completed three arrest forms "by copying the individuals [sic] information from the MPD form 256." (Espinosa Dep. 12.) He also signed the forms, but he did not complete the narrative and he did not obtain any information from any of the officers prior to handling the paperwork. (Espinosa Interrog. 2; Espinosa Dep. 12, 21.) Phifer gave Espinosa the assignment for completing the forms. (Espinosa Interrog. 19.)

In addition to Officer Phifer, Espinosa recalls seeing Officers Khan and Jarboe at the scene, but he does not recall which other officers were present. (Espinosa Interrog. 4, 12.) He did not observe any activity that would support a charge of disorderly conduct. (Espinosa Dep. 22.)

F. Defendant Officer Faraz Khan

Khan was riding with training Officer Jarboe on the night of the arrests. (Khan Interrog. 2.) Jarboe and Phifer had a conversation about going to the house, but Khan does not recall the particulars of that conversation. (*Id.*) Once at the house, he saw "females dressed only in their bra and thong with money hanging out their garter belts." (*Id.*) Khan stayed in the living room. (*Id.*) At no point did he observe any drugs or illegal conduct. (Khan Dep. 12.)

He does not recall who made the decision to arrest the Plaintiffs, but he did not detain or arrest any of the Plaintiffs. (Khan Interrog. 2, 19.) Later he returned to the precinct and began to "process" the Plaintiffs by completing six or seven arrest forms. (Khan Interrog. 2; Khan Dep. 12.) Although Officer Phifer wrote the narrative, Khan completed the front page and signed the forms, but he does not remember who told him to

sign. (Khan Interrog. 2, 7, 19.) Khan testified that because he was in training, his training officer "gave" him the arrests, but at the time he began completing the paper work he did not know the basis of the arrest charge. (Khan Dep. 12-13, 15.) Later, prior to signing the form, he found out from Jarboe that the Plaintiffs "did not have permission, right to be in that house and they're going to be charged with unlawful entry." (Khan Dep. 15.) Other than the information from Jarboe, Khan did not have any information that would substantiate a charge for unlawful entry and he does not know how the decision was reached. (Khan Dep. 13, 15-17.) Indeed, he did not observe anything that led him to believe that Plaintiffs did not have the right to be there. (Khan Dep. 17.)

In addition to Defendants Campanale, Newman, and Espinosa, Khan recalls seeing other officers on the scene, but he does not know who assisted with the arrests of Plaintiffs. (Khan Interrog. 5, 12.)

He did not observe anything at the scene that would support a disorderly conduct charge. (Khan Dep. 16.)

G. Defendant Officer Jason Newman

When Officer Newman entered the property, he observed officers speaking to individuals on the first floor. (Newman Interrog. 2.) Newman went upstairs and found a male "hiding in a closet, one female may have been in the bathroom and another female was just standing in the bedroom." (*Id.*) These persons went downstairs at the direction of the officers and, at some point, Sergeant Suber arrived and someone explained to him "what was going on." (*Id.*) Newman remembers officers asking who lived in the house, but the individuals were unable to answer the questions,

at which time Suber made the decision to arrest the individuals for unlawful entry. (*Id.*)

In addition to Suber and the other four Defendants, Newman remembers seeing several other officers on the scene, but he does not know if any assisted with the arrest of Plaintiffs. (Newman Interrog. 5, 12.) Sgt. Suber ordered Newman to make an arrest. (Newman Interrog. 19.) Newman believes the person he arrested was Ethelebert Louis. (*See* Newman Dep. 15-16.) Newman testified that Louis

> was an individual I basically attached my name to with an arrest. There were a lot of people being arrested. So at this point you just, "This is your guy you're arresting; Officer this is your guy you're arresting." . . . You just—arrest this person, next person is this officer's. Because there's so many people, one officer can't take all [of the Plaintiffs].

(Newman Dep. 16.) When asked the basis for the arrest, Newman responded "no one knew who the owner was. . . . [Louis] did not know who the owner was." (Newman Dep. 20.) Newman did not observe anything at the scene that would justify a disorderly conduct charge. Indeed, he did not observe any illegal conduct. (Newman Dep. 12, 24.)

H. The Arrest Form

Defendants admit one or more of them are listed as the "Arresting Officer" on each of the Plaintiffs' arrest forms. (Doc. 31, Defs.' Summ. J. Brief 8.) However, the record contains only one of those "Arrest/ Prosecution Report" forms and it lists Cory Bonds as the arresting officer and Newman as an assisting officer. (Defs.' Ex. A.) The name of the arrestee is blacked out on the arrest form filed with the Court. (*Id.*)

The narrative on the second page explains that the police responded to the house to "investigate a complaint of illegal activities which generated from inside of the event location. The information came from a former ANC commissioner, W-1. W-1 also stated, the listed property has been vacant for several months." (*Id.*) Although the form lists "Foster" as complainant/witness 1, there is no statement in the record from "Foster."

"Keck" is listed as complainant/witness 2. The record contains a declaration from Randy Keck, who lives three doors down from the house at issue. (Defs.' Ex. O, Keck Decl. ¶ 1.) Keck declares in his undated statement that he "thought" the house was vacant and that about one month prior to the arrests he began to notice many cars parked outside the residence, as well as along the block. (*Id.* ¶¶ 3-4.) However, he does not indicate what information he provided to the police prior to the arrests about what occurred on the night in question.[8]

The narrative on the form indicates that Officer Phifer and Defendant Espinosa heard loud music coming from inside the house upon arrival, although Espinosa did not mention hearing any music when asked via interrogatory to explain the facts surrounding the arrest of the Plaintiffs. (Defs.' Ex. A; Espinosa

---

[8] The record also contains a "Complaint/Witness Statement" from an individual with an unidentified first name and the last name of Waters. (Defs.' Ex. C.) This individual observed "a lot of people going into the house next door," people being searched prior to entering the house, and ladies with overnight bags. (Defs.' Ex. C.) This unsigned and undated statement does not indicate that the house was vacant, that police were informed it was vacant or when the witness shared her observations with the police. (*See id.*)

Interrog. 2.) According to the arrest report, once inside the house, Defendant Parker found marijuana. (*Id.*) However, there is nothing in the record indicating the officers found illegal drugs at the scene. Moreover, Officer Parker testified that, while he smelled marijuana in the air, no drugs were found in the home. (Parker Dep. 14-15.) The report indicates that the home

> was in disarray which is also consistent with it being a vacant property. Further investigation revealed no one could be located as having given permissing [sic] to occupy the listed property.

(Def.'s Ex. A.) Finally, the report lists the charge as unlawful entry in typeface, but that charge is crossed out and disorderly conduct was handwritten onto the form. (*Id.*)

In addition to the non-defendant officers, the arrest report notes the involvement of Defendants Newman, Espinosa, Khan and Parker in the investigation at the scene. (*Id.*)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Moore v. Hartman*, 571 F.3d 62, 66, 387 U.S. App. D.C. 62 (D.C. Cir. 2009) (citing Fed. R. Civ. P. 56(c)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A genuine issue of material fact exists if the evidence, viewed in the light most favorable to the non-movant, "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. A non-moving

party, however, must provide more than "a scintilla of evidence" in support of its position; the quantum of evidence must be such that a jury could reasonably find for the non-moving party. *Id.* at 252.

Here, both parties have moved for summary judgment. Thus, the Court must analyze the Defendants' motion (including the qualified immunity defenses) while viewing the facts in the light most favorable to the Plaintiffs, and, alternatively, analyze the Plaintiffs' motion while viewing the facts in the light most favorable to the Defendants. *See Johnson v. District of Columbia*, 528 F.3d 969, 973-78, 381 U.S. App. D.C. 351 (D.C. Cir. 2008).

III. PROBABLE CAUSE

In this case, each of the Plaintiffs' three claims is predicated upon the allegation that the Plaintiffs were arrested without probable cause. If the police had probable cause to arrest the Plaintiffs, then all three claims fail. Thus, the Court will review this question first.

When the Plaintiffs were arrested at the Anacostia Road house, the basis for the arrest was their alleged violation of the unlawful entry statute. Sometime after the Plaintiffs were taken to the police station, the basis for the arrest changed to their alleged violation of the disorderly conduct statute. Accordingly, the Court will review each of the two grounds for arrest separately.

A. Unlawful Entry

In the instant case, even when considering the facts in the light most favorable to the Defendants, it is clear that Plaintiffs were arrested for unlawful entry without probable cause. Under District of Columbia law, a Plaintiff violates the unlawful entry statute

when she enters private property "without lawful authority" and "against the will of the lawful occupant or of the person lawfully in charge." D.C. Code § 22-3302 (a)(1). It is well settled that "[t]o be against the will of the lawful occupant the entry must be against the expressed will, that is, after warning to keep off." *Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965); *see also Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993) ("When a person enters a place with a good purpose and a bona fide belief in his or her right to enter, that person lacks the requisite criminal intent for unlawful entry. . . ."); Barbara E. Bergman, *Criminal Jury Instructions for the District of Columbia* § 5.401 (Matthew Bender, Rev. Ed.) (unlawful entry requires proof that the accused "knew or should have known that s/he was entering against the person's will").

In the instant case, the evidence is undisputed that the Plaintiffs were expressly or impliedly invited onto the property by a woman named "Peaches" and that several of the police officers were aware of this invitation. Most importantly, it is undisputed that Sergeant Suber made the decision and gave the order to arrest the Plaintiffs for unlawful entry and that he did so even though he was aware that the Plaintiffs were on the property at the invitation of Peaches. While it turns out that Peaches may not have had the authority to invite guests to the house, nothing about what the police learned at the scene suggests that the Plaintiffs "knew or should have known that [they were] entering against the [owner's] will." *See* Criminal Jury Instructions § 5.401.

Even though there is evidence that one or more neighbors told the officers that the property was supposed to be vacant, this is not a case where the

property was boarded up, door latches were broken, no trespassing signs were posted or the manner of securing the property indicated that the owner wanted others to keep out. *See* D.C. Code § 22-3302 (a)(1).[9] Indeed, although the house was in disarray, it is undisputed that the electricity was working, the property contained a mattress, candles, chairs, food, and the bathrooms were functional. (Suber Dep. 11; Parker Dep. 14-15; Louis Dep. 28; Chittams Dep. 27-28, 30-33.) Thus, the neighbors' statements, that the property was "supposed to be" vacant, were insufficient under the circumstances to establish probable cause to believe that the Plaintiffs had been told not to enter by the owner or that the Plaintiffs knew or should have known that they had entered the property against the owner's will. *Compare Jones v. United States*, 282 A.2d 561, 562-63 (D.C. 1971) (defendant lawfully arrested inside vacant apartment building where police discovered broken latch and an opened door with a damaged door panel upon arrival); *Culp v. United States*, 486 A.2d 1174, 1175-77 (D.C. 1985) (officers had probable cause to believe intruders had entered against the express will of the owner where at least some windows on the property were boarded up, the property owner had diligently attempted to keep the windows boarded and the intruder had no

---

[9] "The presence of a person in any private dwelling, building, or other property *that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign*, shall be prima facie evidence that any person found in such property has entered against the will of the person in legal possession of the property." D.C. Code § 22-3302 (a)(1) (2007) (emphasis added). Thus, mere presence in a supposedly vacant building, if the building is not boarded up or displaying a "no trespassing" sign, is not prima facie evidence that the entry into the building was against the will of the owner.

explanation for his presence on the property); *Best v. United States*, 237 A.2d 825 (D.C. 1968) (officer had probable cause where intruder could not provide a logical explanation for his presence in building and the building manager told the officers at the scene that the building was generally kept locked and the public was not invited to enter).

Finally, while Officer Parker's conversation with "Hughes" may have provided evidence that the Plaintiffs did not have permission to remain on the property, the conversation did not provide evidence that Plaintiffs had been warned to stay off of the property or should have known they were not welcome at the time of their entry onto the property. Such evidence is essential to establish probable cause for unlawful entry. *See District of Columbia v. Murphy*, 631 A.2d 34, 38 (D.C. 1993) (finding no evidence of probable cause to arrest for unlawful entry where it was undisputed that the apartment owner told the responding officers she wanted her boyfriend to leave, but she never told the officers that she "actually had *asked* [the boyfriend] to leave [prior to the officers' arrival] and that he had refused.") (emphasis in original), *aff'd on rehearing*, 635 A.2d 929 (1993).

Accordingly, the officers did not have probable cause to support the unlawful entry arrest. Indeed, Suber and three of the defendants erroneously believed that proof of intent to enter the property against the owner's will was unnecessary, contrary to the long-established precedent described above. (*See* Suber Dep. 39; Parker Dep. 19, 31-32; Parker Interrog. 2; Campanale Dep. 35; Newman Dep. 20.)

B. Disorderly Conduct

Similarly, even considering the evidence in the light most favorable to the District, the Court finds that the arrests for disorderly conduct were made without probable cause.

Indeed, the District made no serious attempt in its pleadings to explain how the determination was made that probable cause existed for the offense of disorderly conduct, effectively conceding the issue.[10] The testimony placed into the record by every single police officer who was present on the scene indicated that they did not witness any conduct that justified the disorderly conduct arrests. (Pls' Statement of Undisputed Facts ¶ 1; Defs.' Resp. to Pls.' Statement of Undisp. Facts ¶ 1.) The Defendants have not presented any evidence from Lt. Netter, who ordered the arrests, or from the unidentified representative from the Office of the Attorney General, who advised Netter that the arrests were proper. Despite six rounds of briefings on the two motions for summary judgment, the Defendants have made no substantive effort to set forth what specific facts were relied upon by Netter or the Attorney General's representative and how any such facts established probable cause to arrest each of the Plaintiffs for disorderly conduct.

The only evidence presented about how or why the decision was made to arrest the Plaintiffs for disorderly conduct came from Sgt. Suber, who testified that Lt. Netter said he was told by the OAG representative that he could arrest the Plaintiffs for disorderly conduct based on "loud voices." (Suber Dep.

---

[10] As described below, the District instead relied upon absolute immunity and other arguments to defend against liability for the disorderly conduct arrests.

29-30, 41.) While there was evidence in the record that the police were told of reports of a loud party or loud music and some officers heard loud music upon arrival, there was no evidence that the police were told of "loud voices" or of noise that was so unreasonably loud or sustained for such a lengthy period of time as to justify the arrests for disorderly conduct based on then-existing D.C. Code § 22-1321(3).[11] *See In re T.L.*, 996 A.2d 805, 814 (D.C. 2010) (to find a violation under § 22-1321(3), prohibiting a "breach of the peace" by "shout[ing] or mak[ing] a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons," the court "stress[es] the government's burden of showing that the noise was *unreasonably* loud under the circumstances") (emphasis in original). While their testimony indicates that some of the officers operated under the erroneous belief that "a person cannot be disorderly inside a house," none of them testified that they observed "unreasonably loud," sustained noise that "disturbed a considerable number of persons" when they arrived on the scene.

Furthermore, following a request by the Court for copies of the disorderly conduct charging documents, the record was supplemented with copies of the judicial summonses filed against Plaintiffs Taylor, Chittams, Richardson, Davis, and Louis. (Doc. 37.) Based on those summonses, it appears that Defendants did not even rely upon then existing D.C. Code § 22-1321(3) to make the arrests. Rather, each summons cited D.C. Code § 22-1321(1) as the basis for the disorderly conduct charge. (*Id.*) Pursuant to the then-existing version of D.C. Code § 22-1321(1), which

---

[11] Effective 2011, the disorderly conduct statute was significantly amended.

prohibited a "breach of peace" by "act[ing] in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others," an arrest would have required evidence that each of the Plaintiffs used words likely to produce violence. *See Shepherd v. District of Columbia*, 929 A.2d 417, 418-19 (D.C. 2007). Defendants have offered no such evidence here.

Additionally, whether viewed pursuant to § 22-1321(1) or § 22-1321(3), Defendants have made no attempt to proffer evidence that probable cause existed that would justify the arrest of each individual Plaintiff for disorderly conduct, as required by the Fourth Amendment. *See Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause . . . . [A] search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another . . . .") (citations omitted); *Barham v. Ramsey*, 434 F.3d 565, 573, 369 U.S. App. D.C. 146 (D.C. Cir. 2006) ("Even assuming that Newsham had probable cause to believe that some people present that morning had committed arrestable offenses, he nonetheless lacked probable cause for detaining everyone who happened to be in the park. It is firmly established that, to comport with the *Fourth Amendment*, a warrantless search or seizure must be predicated on particularized probable cause.") (citing *Ybarra*, 444 U.S. at 91).[12]

---

[12] Moreover, there is no evidence or credible suggestion in this case that the police were confronted by a riotous mob or any other exigency that could justify these arrests based on less than

Thus, the Court finds that the undisputed facts compel a finding that Plaintiffs were arrested without probable cause for unlawful entry and disorderly conduct. We now turn to an analysis of each of the three causes of action, and the defenses applicable to each.

IV. SECTION 1983—FOURTH AMENDMENT CLAIMS

To establish a claim against the police officers under 42 U.S.C. § 1983, Plaintiffs must demonstrate that the officers, while acting under color of state law, deprived the Plaintiffs of "rights, privileges, or immunities secured by the Constitutions and laws" of the United States. 42 U.S.C. § 1983. The complaint alleges that the police officers violated Plaintiffs' Fourth Amendment rights by arresting them without probable cause to believe that they had committed a crime. As shown above, the Plaintiffs have proven that they were arrested without probable cause. Thus, the Plaintiffs

---

particularized probable cause. Compare Washington *Mobilization Committee v. Cullinane*, 566 F.2d 107, 116, 120, 184 U.S. App. D.C. 215 (D.C. Cir. 1977) (where Plaintiffs' who were arrested for disorderly conduct challenged their mass arrests because some demonstrators were not guilty of violence and some Plaintiffs were not demonstrators, the Court explained that "the police cannot be expected to single out individuals; they may deal with the crowd as a unit" when "confronted with a mob"); *Carr v. District of Columbia*, 587 F.3d 401, 408, 388 U.S. App. D.C. 332 (D.C. Cir. 2009) (rejecting the lower court's finding that the police lacked particularized probable cause to arrest all of the protestors, the appellate court reasoned that "A requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a large riot, particularly when it is on the move-at night.").

have proven the basic elements of their Section 1983 claim.

In response to Plaintiffs' Section 1983 claim against the officers in their individual capacities, the Defendant officers assert a qualified immunity defense. "Although government officials may be sued in their individual capacities for damages under § 1983 . . ., qualified immunity protects officials from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672, 689, 386 U.S. App. D.C. 144 (D.C. Cir. 2009) (internal citation marks omitted) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). While the question is not entirely free from doubt, it appears that the burden of proving qualified immunity rests with the Defendants. *See Reuber v. United States*, 750 F.2d 1039, 1058 n.25, 242 U.S. App. D.C. 370 (D.C. Cir. 1984). Thus, as to the defense motion for summary judgment, the Court must first determine whether the facts, construed in the light most favorable to the injured parties, show that the officers violated a constitutional right, and second, whether that constitutional right was clearly established at the time of the incident. *See Barham v. Salazar*, 556 F.3d 844, 847, 384 U.S. App. D.C. 401 (D.C. Cir. 2009). If the answer to either of these questions is no, then the defense motion for summary judgment must be granted because the officers are entitled to qualified immunity.[13]

---

[13] This Court may exercise its discretion to decline determining whether the officers violated a constitutional right if it appears doubtful that any such right, even if it existed, was clearly established at the time of the incident. *See, e.g. Jones v. Horne*,

As to answering the second question, our Circuit Court has recently explained:

> In a suit alleging arrest or prosecution in violation of the Fourth Amendment, a defendant who mistakenly concludes that probable cause is present is nonetheless entitled to qualified immunity if a reasonable officer could have believed the arrest to be lawful, in light of clearly established law and the information the arresting officers possessed. Such a reasonable if mistaken belief that probable cause exists is sometimes termed "arguable probable cause."

Moore v. Hartman, 644 F.3d 415, 422, 396 U.S. App. D.C. 28 (D.C. Cir. 2011) (citations and some quotation marks omitted); *see also* Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of* Section 1983 § 8.24 (4th ed.). When considering Plaintiffs' motion for summary judgment, the Court will review the evidence in the light most favorable to the Defendants.

A. Unlawful Entry Arrests & Defendants' Qualified Immunity Defense

With these principles in mind, the Court turns to the Section 1983 claim based on the arrest of the Plaintiffs for unlawful entry. Subsequently, the Court will consider the Section 1983 claim based on the arrest of the Plaintiffs for disorderly conduct.

---

634 F.3d 588, 597, 394 U.S. App. D.C. 261 (D.C. Cir. 2001) (citing *Pearson v. Callahan*, 555 U.S. 223, 236-37, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)). Here, the Court deems it appropriate to address both questions.

1. Plaintiffs' Constitutional Rights Were Violated

As stated above, the Court finds that the Plaintiffs were arrested for unlawful entry without probable cause, which violated their rights under the Fourth Amendment.

2. The Constitutional Rights At Issue Were Clearly Established

Having established that Plaintiffs' constitutional rights were violated, this Court "must determine 'whether the right was clearly established' at the time of the alleged violation." *Bame v. Dillard*, 637 F.3d 380, 384, 394 U.S. App. D.C. 446 (D.C. Cir. 2011) (citations omitted). When determining whether a given constitutional right was "clearly established" for the purposes of establishing qualified immunity,

> "we look to cases from the Supreme Court and [the United States Court of Appeals for the District of Columbia], as well as to cases from other courts exhibiting a consensus view," *Johnson v. District of Columbia*, 528 F.3d 969, 976, 381 U.S. App. D.C. 351 (D.C. Cir. 2008)—if there is one. The facts of such cases need not be "materially similar . . . but have only to show that the state of the law at the time of the incident gave the officer fair warning that his alleged misconduct . . . was unconstitutional." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L.Ed.2d 666 (2002)).

Bame, 637 F.3d at 384 (internal quotation marks omitted); *see Pearson v. Callahan*, 555 U.S. 223, 243-44, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citing to

state and federal court cases when discussing clearly established law).

Applying these principles to the present facts, there is no question that the law was clearly established at the time of the arrests. For many decades preceding these arrests, District of Columbia law has consistently provided that probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner or authorized agent. *Bowman*, 212 A.2d at 611; *Jones*, 282 A.2d at 562-63; Culp, 486 A.2d at 1175-77; *Artisst v. United States*, 554 A.2d 327, 329-30 (D.C. 1989). This is not a case where the parameters of the unlawful entry statute were so muddled that the officers were unable to "'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *See Butera v. District of Columbia*, 235 F.3d 637, 652, 344 U.S. App. D.C. 265 (D.C. Cir. 2001) (citing *Anderson v. Creighton*, 483 U.S. 635, 646, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

The Defendants posit several theories about why the law was not really clearly established in these circumstances. None of them have merit.

First, Defendants argue no clearly established law actually protected these Plaintiffs on that evening. Under the "community caretaker" and/or "exigent circumstances" exceptions to the warrant requirement, the Defendants contend they had authority to enter the property where Plaintiffs, as social guests, had no reasonable expectation of privacy. This argument is irrelevant because Plaintiffs do not challenge the lawfulness of the officers' warrantless entry onto the property or the initial detention of

Plaintiffs during the on-scene investigation. (*See* Doc. 33, Pls.' Summ. J. Resp. 12.)

Defendants boldly proceed to argue that social guests do not have the right to challenge Constitutional violations relating to seizures of their persons. (Doc. 36, Defs.' Reply Br. 2.) However, Defendants are unable to direct the Court to any legal authority that social guests lack Constitutional protection from unreasonable seizures of their *persons*, as opposed to a reduced expectation of privacy with respect to searches or seizures of their *property*. Thus, notwithstanding any purported diminished expectation of privacy as social guests, Plaintiffs most certainly retained their expectation that probable cause was necessary to effectuate each of their arrests; Defendants' argument misses the mark.[14]

Defendants also suggest that their mistaken understanding of the law of unlawful entry supports their claim of qualified immunity. However, "[i]f the law was clearly established, the [qualified] immunity

---

[14] Although the Court will not address them all in this opinion, the Defendants have made a number of other near-frivolous and marginally relevant arguments in their briefs, For instance, the Defendants argue that the Plaintiffs could be arrested on a showing less than probable cause because they were social guests on the property and because the police officers were undertaking a "community caretaker" function, even though they have cited no authority, and this Court knows of none, that permits a traditional arrest on less than probable cause in such circumstances. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) ("we confirm today what our prior cases have intimated: the standard of probable cause applies to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.") (some internal quotation marks omitted) (quoting *Dunaway v. New York*, 442 U.S. 200, 208, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)).

defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. A police officer cannot escape liability "if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute." *Butz v. Economou*, 438 U.S. 478, 493-94, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978). Thus, "obvious" or "manifestly erroneous" mistakes of law cannot serve as the basis of a qualified immunity claim. Nonetheless, the officers can still prevail if they claim "extraordinary circumstances and can prove that [they] neither knew nor should have known of the relevant legal standard. But . . . the defense would turn primarily on objective factors." *Harlow*, 457 U.S. at 819; accord, *Hobson v. Wilson*, 737 F.2d 1, 25, 237 U.S. App. D.C. 219 (D.C. Cir. 1984).

Here, the Defendants have not cited to any extraordinary circumstances which might have justified their failure to know the relevant law, and the Court is aware of no such circumstances. The unlawful entry statute is not a complicated one, and it is a law that is fundamental to policing because it must be applied daily in various commercial and residential contexts. All police officers, whether veteran or trainee, should be expected to know what it means. Accordingly, Defendants' mistake about the law was not immunized, and the Court finds that no genuine issues of disputed fact exist with respect to whether the officers violated Plaintiffs' clearly established constitutional rights.[15]

---

[15] Defendants also contend they are protected by qualified immunity because "officers of reasonable competence" could disagree about whether there was probable cause to arrest the Plaintiffs. (Doc. 30, Defs.' Response to Pls' Summ. J Mot. 5); *see*

3. Defendants' Additional Qualified Immunity Arguments

The Defendants make two further arguments in support of summary judgment based on qualified immunity: reliance on the probable cause determination of fellow police officers (aka collective knowledge) and acting at the direction of supervisors.

(a) The Collective Knowledge Doctrine and/or Fellow Officer Rule

The Defendants argue that they are entitled to qualified immunity because they collectively had sufficient information to support the arrests. (*See* Doc. 31, Defs.' Summ. J. Brief 24-27.) As this Circuit has recognized, "probable cause may emanate from the collective knowledge of the police, though the officer who performs the act of arresting or searching may be far less informed." *United States v. Hawkins*, 595 F.2d 751, 752 n.2, 193 U.S. App. D.C. 366 (D.C. Cir. 1978); accord *Smith v. United States*, 358 F.2d 833, 835, 123 U.S. App. D.C. 202 (D.C. Cir. 1966). In the present case, however, even considering all of the knowledge collectively held by all of the police officers, there was not sufficient information to establish probable cause.

Alternatively, the individual officers submit that pursuant to the "fellow officer rule," they are entitled to qualified immunity even in the absence of collective

---

Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (noting that immunity should be recognized if officers of "reasonable competence" could disagree). However, officers of "reasonable competence" are expected to know the law. *Harlow*, 457 U.S. at 818-19. Because these officers erroneously believed that the question of whether Plaintiffs had been invited onto the property was irrelevant, there was no disagreement between "reasonably competent" officers.

knowledge of probable cause because it was objectively reasonable for each of them to rely upon the probable cause determination of one or more of their fellow officers. *See Barham v. Ramsey*, 434 F.3d 565, 577, 369 U.S. App. D.C. 146 (D.C. Cir. 2006); *Bolger v. District of Columbia*, 608 F. Supp.2d 10, 24 (2009) (citing *Barham*, 556 F.3d at 850); cf., Wayne R. LaFave, *Search & Seizure: A Treatise on the 4th Amendment* § 3.5 n.16 (4th ed.) (where police officer conveys some facts that indicate probable cause to a fellow officer, but non-conveyed facts would have defeated probable cause, the officer relying upon the conveyed facts may be immune from tort liability) (citing *Row v. Holt*, 864 N.E.2d 1011 (Ind. 2007)).

In the case at bar, the Court finds that Defendants Parker and Campanale have failed to show, by undisputed facts, that it was objectively reasonable for these officers to rely on the information communicated by others at the scene to support the arrests. While Parker was aware from other officers that the house was supposedly abandoned and there were people inside who should not be there, he knew first-hand that Peaches had given the Plaintiffs permission to enter the house. (Parker Dep. 15-18; Parker Interrog. 2,3.) Although he was informed by the purported owner that Plaintiffs did not have permission to occupy the property, Parker had no evidence that the owner had warned Plaintiffs not to enter or that Plaintiffs should have known entry was forbidden. (Parker Dep. 17-18; Parker Interrog. 2.)

Campanale was also aware from other officers that the house was supposedly abandoned and that there were people inside who should not be there, but he also knew that Peaches had given the Plaintiffs permission to entertain at the house. (Campanale Dep. 35;

Campanale Interrog. 2.) He also knew first-hand that some of the Plaintiffs were present at the "invitation" of someone else. (Campanale Interrog. 9.)

Thus, even considering the evidence in the light most favorable to the Defendants, the Court finds that Parker and Campanale are not entitled to qualified immunity on the Section 1983 claims arising out the unlawful entry arrests and, furthermore, that Plaintiffs are entitled to summary judgment with respect to these two officers.

As to Defendants Espinosa, Newman and Khan, it is less clear from this record whether they each specifically knew that the Plaintiffs had been invited onto the property. While these three officers did not make such admissions in the sworn documents found in the record, the Defendants' own Statement of Undisputed Facts admits that "MPD Officers were told by some social guests at 115 Anacostia Road, N.E. that a woman named 'Tasty' or 'Peaches' owned or rented 115 Anacostia Road, N.E., and that she had given permission to hold a bachelor party on site that night." (SOF ¶ 27.) Given this admission, these remaining three Defendants are not entitled to summary judgment on the theory that they were solely relying upon the judgment of their fellow officers and did not know themselves that probable cause was lacking due to the fact that Peaches had invited Plaintiffs onto the property. Likewise, the Plaintiffs are not entitled to summary judgment, given the dispute in the evidence. Therefore, the jury will have to decide whether Espinosa, Newman and Khan were aware of the invitation, and that factual finding will dictate whether those Defendants are entitled to qualified immunity based on the fellow officer defense.

(b) Acting at the Direction of Supervisory Officers

Similar to their contention based upon the fellow officer rule, Defendants assert that they are protected by qualified immunity because they were ordered by superior officers to arrest Plaintiffs.

However, our Circuit has specifically rejected the argument that immunity automatically attaches were public officials violate a citizen's rights at the direction of higher authority. In *Hobson v. Wilson*, 737 F.2d 1, 237 U.S. App. D.C. 219 (D.C. Cir. 1984), FBI agents argued that they were protected by qualified immunity because they had acted in compliance with the agency's approved policy when they conducted counter-intelligence operations in violation of plaintiffs' First Amendment rights. Rejecting this argument, the Court reasoned "[i]n its most extreme form, this argument amounts to the contention that obedience to higher authority should excuse disobedience to law, no matter how central the law is to the preservation of citizens' rights. We have no hesitation in rejecting this new argument." *Id. at 67*. Our Circuit is not alone. *See, e.g. Kennedy v. City Of Cincinnati*, 595 F.3d 327, 336 (6th Cir. 2010) ("[S]ince World War II, the just following orders defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order.") (citing *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) (internal quotation marks omitted)); *Brent v. Ashley*, 247 F.3d 1294, 1305 (11th Cir. 2001) ("following orders does not immunize government agents from civil rights liability); *Leonard v. Compton*, No. 1:03CV1838, 2005 WL 1460165, at *6 (N.D. Ohio June 17, 2005) ("Just as an official policy

does 'not make reasonable a belief that was contrary to a decided body of case law,' . . . police officers cannot obtain a license to violate clearly established constitutional rights from their superior officers.") (citing *Wilson v. Layne*, 526 U.S. 603, 617, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)).

Some courts, however, have permitted a "just following orders" defense in limited, specific, circumstances. "While it is typically no defense for an officer to claim he was simply 'following orders,' plausible instructions from a superior or fellow officer can support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists." *Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 199 (3d Cir. 2005) (citing *Bilida v. McCleod*, 211 F.3d 166, 174-75 (1st Cir. 2000)).

In the present case, however, the only way that the superior officer's order to arrest the Plaintiffs could have been "plausible" and could have given the subordinate officer a reasonable basis to conclude that legal justification existed to arrest Plaintiffs for unlawful entry would have been if the subordinate officer was not aware of the invitation for Plaintiffs to enter the property. Consequently, the Court finds that any of the Defendants, including the two trainees (Espinosa and Khan), who were aware of the Plaintiffs' invitation to enter the property failed to act reasonably given the circumstances, despite Sgt. Suber's orders. *See Leonard*, 2005 WL 1460165, at *6 (finding both training officer and rookie officer could not "avoid liability by simply arguing" they were "following orders."). Accordingly, in this case, the final analysis of qualified immunity based upon the

"following orders" argument is identical to that under the "fellow officer" rule. The argument does not prevent liability for Defendants Parker and Campanale, but Defendants Espinosa, Newman and Khan could prevail depending upon the jury's factual finding at trial.

4. Defendants' Claim That They Did Not Personally Arrest Plaintiffs for Unlawful Entry Is Unavailing

Although Defendants admit their names appeared on Plaintiffs' arrests reports, (Doc. 31, Defs.' Summ. J. Br. 8), Defendants claim there is no evidence they personally arrested the Plaintiffs and, therefore, they are not liable for the Section 1983 claim. The Court is unpersuaded by this argument. As an initial matter, two of the officers (Campanale and Newman) admit that they each arrested one of the Plaintiffs. (Campanale Dep. 35, 37; Newman Dep. 15-16.)

With respect to the three remaining officers, Khan, Espinosa and Parker, they cannot avoid liability simply by pointing a finger at the other officers on the scene. "One who directs or assists an unlawful arrest may be liable." *Gordon v. Degelmann*, 29 F.3d 295, 298 (7th Cir. 1994) (citing *Kilbourn v. Thompson*, 103 U.S. 168, 200, 26 L. Ed. 377 (1880)). As explained by the Seventh Circuit:

> Federal common law principles of tort and damages govern recovery under section 1983. It is axiomatic that where several independent actors concurrently or consecutively produce a single, indivisible injury, each actor will be held jointly and severally liable for the entire injury. *Restatement (Second) of Torts*, §§ 875, 879. In such a case the injured party

> may proceed to judgment against any or all of the responsible actors in a single or in several different actions. *See Restatement (Second) of Torts*, § 882.

Watts v. Laurent, 774 F.2d 168, 179 (7th Cir. 1985) (citations to cases omitted); *see also Burns v. Reed*, 500 U.S. 478, 484, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (Section 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.") (citations and internal quotation marks omitted); Michael Avery, David Rudovsky & Karen M. Blum, *Police Misconduct Law and Litigation* § 12.36 (3d ed.) (explaining joint and several liability in the context of Section 1983 claims).

The Court finds that Officers Khan, Espinosa and Parker are subject to liability as joint tortfeasors. It is undisputed that all three officers were present on the scene, all three were present in the house during at least some portion of the investigation, and all three were actively involved in the matter at some juncture. Parker admittedly spoke with Peaches and Hughes, as well as one or more Plaintiffs who told the officers that Peaches had given Plaintiffs permission to occupy the property. (Parker Dep. 15-18: Parker Interrog. 2, 3.) Parker also provided Sgt. Suber with the results of the investigation, observed officers making arrests, and provided investigative information to the officers who "took" the arrests. (Parker Dep. 20.) Khan admitted signing and completing a portion of six or seven arrest forms, while Espinosa admitted signing and completing a portion of three forms. (Khan Dep. 12; Khan Interrog. 2, 7, 9; Espinosa Interrog. 2; Espinosa Dep. 12, 21.)[16] Thus, the officers' own testimony establishes

---

[16] The Court notes that although Khan claims he did not physically arrest any of the Plaintiffs, (Khan Interrog. 2, 19),

that they "actively participate[ed] in a wrongful act, by cooperation or request, or . . . lend[ed] aid" to the arresting officers. *See* Police Misconduct § 12.36; *see also James by James v. Sadler*, 909 F.2d 834 837 (5th Cir. 1990) (reversing summary judgment for local police officers who provided back-up during illegal search by narcotics agents because role of the local officers was "integral to the search"). As such, Khan, Espinosa and Parker are jointly and severally liable with whomever actually placed the Plaintiffs in handcuffs and transported them to the police station.

Defendant's reliance on *Fernandors v. District of Columbia*, 382 F. Supp.2d 63 (D.D.C. 2005) is misplaced. In *Fernandors*, the District of Columbia conceded that the two officers who first arrived on the scene and apprehended the plaintiff were not entitled to qualified immunity because of disputed factual issues. *Id.* at 71. The Court held that a third officer was entitled to qualified immunity on a false arrest claim because he arrived at the scene after the apprehending officers and it was undisputed that he did not make the determination to arrest the plaintiff. *Id.* at 71-74. Indeed, he possessed no information about the circumstances that supported the arrest. *See id.* at 72-73.

In contrast, Khan, Espinosa and Parker saw the events unfold and observed the results of the investigation on the scene. As such, either they had first-hand knowledge that probable cause did not exist to arrest Plaintiffs or they had enough information to question whether probable cause existed. Thus, the

---

Parker testified that he saw Khan make an arrest. (Parker Interrog. 12, 20.)

facts of the present case are vastly different from the facts in *Fernandors*.

Rather, the instant case is more like *Dubner v. City and County of San Francisco*, 266 F.3d 959 (9th Cir. 2001). In *Dubner*, one of the officers on the scene signed the plaintiff's arrest form and admitted making arrests during a mass protest, but could not remember whether she had arrested the plaintiff. *Id.* at 964. At the end of trial, the court dismissed plaintiff's unlawful arrest claim because she had no evidence that the officer who signed the arrest form had actually made the arrest. *Id.* at 964-65. The Ninth Circuit Court of Appeals reversed, explaining that while plaintiff bore the burden of proving the unlawful arrest, the burden of production then shifted to the defendant to provide evidence that the arresting officers had probable cause. *Id.* at 965 "This minimal burden shifting forces the police department, which is in the better position to gather information about the arrest, to come forward with some evidence of probable cause." *Id.* The Court reasoned that shifting the burden of production to the defendants, prevented "this exact scenario where police officers can hide behind a shield of anonymity and force plaintiffs to produce evidence that they cannot possibly acquire." *Id.* The Ninth Circuit's application of this burden shifting approach in Section 1983 false arrest cases is consistent with the law of the United States Court of Appeals for the District of Columbia. *See Dellums v. Powell*, 566 F.2d 167, 175, 184 U.S. App. D.C. 275 (D.C. Cir. 1977) (explaining that once a plaintiff establishes that she was arrested "without process," the "burden then shifts to the defendant to justify the arrest.")

Finally, given the unique circumstances presented in the instant case, it would not be in the interest of justice to grant summary judgment to police officers who signed the arrest forms but are now unwilling to take responsibility for the arrests. *See Rauen v. City of Miami*, No. 06-21182-CIV, 2007 U.S. Dist. LEXIS 14931, 2007 WL 686609, at *4-5 (S.D. Fla. March 2, 2007) (denying motion to dismiss where plaintiffs could not identify individual officers involved in arrest of protestors because the officers at the scene wore identical riot gear, their faces were covered by shields and their uniforms had no identifying information). Accordingly, Defendants' assertion that they did not arrest Plaintiffs does not justify dismissal of Plaintiffs' claims.

B. Disorderly Conduct Arrests & Defendants' Absolute and Qualified Immunity Defenses

As noted above, the Section 1983 unlawful arrest claim has been brought against five police officers, Edwin Espinosa, Jason Newman, Anthony Campanale, Andre Parker and Faraz Khan. This claim was not brought against the City, Lieutenant Netter (who ordered the arrests), or the representatives within the office of the Attorney General who advised Netter to order the arrests. The five police officer Defendants contend they are entitled to summary judgment on the Section 1983 claim based upon the disorderly conduct arrests because the Attorney General's office made the decision to "charge" the Plaintiffs and, because charging is a discretionary function of the executive branch, the arrests are therefore protected by absolute immunity. This argument is without merit.

The Supreme Court held over twenty years ago that a prosecutor does not enjoy absolute immunity from a Section 1983 action challenging her erroneous advice

to the police that there was probable cause to arrest the plaintiff, because "the prosecutorial function of giving legal advice to the police" is not the type of adversarial prosecutorial activity that merits absolute immunity protection. *Burns v. Reed*, 500 U.S. 478, 496, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991). Thus, the fact that in the instant case a prosecutor advised the police that there was probable cause to arrest the Plaintiffs for disorderly conduct does not clothe the police officers with absolute immunity because they relied upon such advice. *See id.*; *see also Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672, 683, 386 U.S. App. D.C. 144 (D.C. Cir. 2009) (citing *Burns*, 500 U.S. at 492-96).[17] Accordingly, reliance by police officers upon the advice of a representative from the Attorney General does not provide absolute immunity, but it does factor into the qualified immunity analysis, along with all of the other facts and circumstances. *Id.*; *see also Kelly v. Borough of Carlisle*, 622 F.3d 248, 254-55 (3d Cir. 2010) (applying qualified immunity standard and rejecting argument that seeking advice of prosecutor makes action by police officer per se objectively reasonable) (citing *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004)).

Apparently because the Defendants placed complete reliance on their absolute immunity argument, they

---

[17] The cases cited by Defendants in support of the proposition that absolute immunity protects prosecutorial "charging decisions" are inapposite, because the plaintiffs here are challenging their arrests, rather than their charges, and charging is the act of lodging of a criminal complaint. *See Marrow v. United States*, 592 A.2d 1042, 1046 (D.C. 1991) ("an individual is 'charged' . . . when a criminal complaint . . . and warrant . . . are signed by a judge and filed . . ."); accord *Burns*, 500 U.S. at 494 ("absolute prosecutorial immunity [is justified] only for actions that are connected with the prosecutor's role in judicial proceedings").

have failed to argue or brief how they are entitled to qualified immunity for the Section 1983 claim based on the unlawful disorderly conduct arrests. Thus, the Defendants, despite six rounds of briefings on the two motions for summary judgment, have made no effort to set forth what specific facts were relied upon by the police officers or the Attorney General's representative in deciding to arrest the Plaintiffs for disorderly conduct, how any such facts established probable cause to arrest the Plaintiffs for disorderly conduct, or why the Defendants' actions were objectively reasonable. Therefore, even if the Court were to construe the Defendants' motion for summary judgment as including a qualified immunity argument as to this claim, the Court is without any basis to grant judgment for Defendants. Accordingly, the defense motion for summary judgment on the Section 1983 disorderly conduct arrests is denied.[18]

Indeed, the Court finds that Plaintiffs' motion for summary judgment is due be to granted, in part, because qualified immunity does not apply to any officers who participated in the disorderly conduct arrests. The advice of the prosecutor's office does not make these arrests objectively reasonable and there is no evidence in the record that Netter or the OAG representative attempted to ascertain any specific information about the level, type, or duration of noise at the house or who was responsible for creating the "loud voices" before ordering the mass arrest of every

---

[18] The Defendants assert that none of them participated in the disorderly conduct arrests. However, each of the collateral/bond receipts submitted for the record list one of the five Defendant officers as the arresting officers on the disorderly conduct charges, thereby precluding summary judgment against the Plaintiffs on this ground. (*See* Doc. 38 at 5-9.)

single person who happened to be in the house when the police arrived.

Furthermore, Defendants have made no attempt to proffer evidence that probable cause existed as to each Plaintiff, as required by the Fourth Amendment. *See Barham*, 434 F.3d at 573 ("No reasonable officer in Newsham's position could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park. Even assuming that Newsham had probable cause to believe that some people present that morning had committed arrestable offenses, he nonetheless lacked probable cause for detaining everyone who happened to be in the park."). It will be up to the jury to determine which Defendant officers, if any, are liable for having participated in the disorderly conduct arrests.

V. STATE LAW FALSE ARREST CLAIMS

The District of Columbia is liable, as *respondeat superior*, for the tort of false arrest, if an MPD officer commits the tort of false arrest while acting within the scope of his employment. *See generally Wade v. District of Columbia*, 310 A.2d 857, 863 (D.C. 1973) (en banc); *see also Dellums v. Powell*, 566 F.2d 216, 223, 184 U.S. App. D.C. 324 (D.C. Cir. 1977) (citing *Wade*, 310 A.2d at 857). As discussed above, the Court finds that each of the Plaintiffs was arrested without probable cause. However, because the liability of the City is derivative of the liability of the police officer, any individual defenses available to the police officer will also preclude judgment against the City.[19] *See*

---

[19] In their brief, the Plaintiffs clarify that they are asserting Count II against the District of Columbia, as well as against the officers in both their official and individual capacities. (Doc. 33, Pls.' Summ. J. Response 4.)

Minch v. District of Columbia, 952 A.2d 929, 938 (D.C. 2008).

"Under District of Columbia law, a police officer may justify an arrest by demonstrating that "(1) he or she believed, in good faith, that his or her conduct was lawful, and (2) this belief was reasonable." *Scott v. District of Columbia*, 101 F.3d 748, 754-55, 322 U.S. App. D.C. 75 (D.C. Cir. 1996) (citing *District of Columbia v. Murphy*, 631 A.2d 34, 36 (citations and internal quotation marks omitted), *on reh'g*, 635 A.2d 929 (D.C. 1993)); *see* Stevens, Ed., *Standardized Civil Jury Instructions for the District of Columbia* § 18.03 (2011 Rev. Edition). Thus, even if an arrest is unlawful, a defendant may avoid liability if he can show that he had a subjective good faith belief that his conduct was justified and that subjective belief was reasonable. *See Scott*, 101 F.3d at 753-55 (reversing jury verdict against two arresting officers who had a reasonable, good faith belief that Plaintiff was properly in their custody and who could not have known from their observations that the arrest was not authorized under District of Columbia law) (citing *Murphy*, 631 A.2d at 36); *Liser v. Smith*, 254 F. Supp. 2d 89, 96-100 (D.D.C. 2003) (granting summary judgment for defendant officers where officers arrested plaintiff based on an ATM video recording time-stamp because the AUSA had made the final probable cause determination and the officers had a good faith reasonable belief that the time-stamp was accurate, although they later discovered it was not);

The Court will dismiss the state law claims asserted against the officers in their official capacities because such claims are duplicative of the claims asserted against the District of Columbia. *See Atchinson v. District of Columbia*, 73 F.3d 418, 424, 315 U.S. App. D.C. 318 (D.C. Cir. 1996).

see also Weishapl v. Sowers, 771 A.2d 1014, 1020-21 (D.C. 2001); *Minch v. District of Columbia*, 952 A.2d 929, 937-38 (D.C. 2008). In deciding whether the officer acted in good faith, the evidence must be viewed from the perspective of the officer, not from the plaintiff's perspective. Civil Jury Instructions § 18.03.

A. Unlawful Entry

Defendants argue that they are entitled to summary judgment on the state law unlawful entry claim because a reasonable officer could have believed, in good-faith, that the arrests were appropriate given the statements by the purported owner that he had not given the Plaintiffs or Peaches permission to occupy the premises. (Doc. 31, Defs.' Summ. J. Brief 29.) If the unlawful entry statute justified arrest solely based upon evidence that Plaintiffs were discovered on the property without permission from the owner, then all of Defendants could rely upon the good-faith defense. However, as set forth above, the statute requires more.

It is well settled that where a police officer acts on the basis of an erroneous understanding of the statute, the officers' subjective beliefs are not reasonable. *See Dellums v. Powell*, 566 F.2d 167, 176-77, 184 U.S. App. D.C. 275 (D.C. Cir. 1977) (stating, while applying the subjective, good-faith belief test, that "an arrest may not be 'justified by ignorance or disregard of settled, indisputable law.'") [20] Accordingly, Plaintiffs are

---

[20] Although the Court in *Dellums v. Powell*, 566 F.2d 167, 176-77, 184 U.S. App. D.C. 275 (D.C. Cir. 1977), reached this holding in a Section 1983 false arrest case, the analysis is still applicable to a common law false arrest claim. *Dellums* was handed down under prior Section 1983 law which provided that officers were entitled to qualified immunity where their conduct was objectively reasonable or where they had a subjective good faith belief that their conduct was lawful. *See Harlow v. Fitzgerald*,

entitled to summary judgment on the common law false arrest claim based upon unlawful entry as to the Defendant District of Columbia and as to those individual Defendant officers, Parker and Campanale, who knew or should have known prior to the arrest that the Plaintiffs had been invited to enter the property, but failed to recognize the relevance of that information. Where the officers knew of the invitation to the Plaintiffs, the Court finds that their belief that the unlawful entry arrests were proper was neither bona fide nor reasonable. *Compare*, *District of Columbia v. Tulin*, 994 A.2d 788, 800 (D.C. 2010) (court found that where the defendant police officer had a bona fide, but mistaken, belief that the arrest was proper, she was the lowest ranking person on the scene, and she was directly advised to arrest the plaintiff by a higher ranking officer, she had a reasonable, subjective good-faith belief that entitled her to the defense).

As with the § 1983 unlawful entry claim, the jury must decide the extent to which Officers Newman, Khan and Espinosa knew Plaintiffs had been invited to the house.

B. Disorderly Conduct

With respect to the disorderly conduct charge, as discussed above, the Court finds that the Plaintiffs were arrested without probable cause. Because there is a factual dispute regarding whether the defendant officers were involved in the arrests for that charge, both motions for summary judgment as to the claims against the individual Defendants must be denied. It

---

457 U.S. 800, 815-20, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In 1982, five years after *Dellums*, the United States Supreme Court rejected the subjective portion of the qualified immunity test for federal claims. *Harlow*, 457 U.S. at 820.

will be up to the jury to determine which individual police officer Defendants participated in the disorderly conduct arrests.

The District of Columbia was named as a Defendant to this claim, and the city is potentially liable under *respondeat superior* even if none of the named Defendant police officers are held liable because a city employee, Lt. Netter, ordered the arrest of the Plaintiffs. Thus, the District is liable for false arrest unless it can show that Netter had a subjective belief that the arrest was justified and that such a belief was reasonable. However, the District failed in its pleadings supporting its summary judgment motion or in opposition to Plaintiffs's motion to submit a declaration, deposition testimony, or any other direct evidence about the state of mind of Netter or those with whom he consulted. Thus, the District has failed to create a disputed issue of fact as to whether Netter's order to arrest the Plaintiffs was subjectively reasonable and in good faith, as the undisputed evidence in the record indicates instead that it was "the product of the government's willful ignorance, investigative negligence, or [was] otherwise unreasonable." *Liser v. Smith*, 254 F. Supp.2d 89, 97 (D.D.C. 2003). Therefore, the Court grants the Plaintiffs' motion for summary judgment on the disorderly conduct false arrest claim as asserted against the District of Columbia.

VI. NEGLIGENT SUPERVISION CLAIM

The negligent supervision claim has been brought solely against Defendant District of Columbia. (Doc. 33, Pls.' Summ. J. Response 4.) The District of Columbia courts have adopted the following Restatement of Agency provision with respect to employer liability for negligent supervision:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders o[r] in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others;
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency § 213 (1958), cited *in District of Columbia v. Tulin*, 994 A.2d 788, 795 (D.C. 2010) (false arrest case involving liability of the City for conduct of supervisory police officer).

Applying the Restatement to the facts in the instant case and viewing those facts in the light most favorable to the District, the Court finds that the Plaintiffs have proven their claim for negligent supervision. For the reasons outlined above, the Court finds that the undisputed evidence shows that both Netter and Suber gave "improper or ambiguous orders," and each supervisor "permitt[ed] or faile[ed] to prevent" negligent conduct by their subordinate officers. *See Restatement (Second) of Agency* § 213(a), (d).

The District proffers two arguments in support of its defense, neither of which is persuasive. First, the District argues it cannot be held liable for negligent supervision in the absence of some antecedent act that

put the District on notice that its employees had previously committed torts or acted in an incompetent manner. *See DaKa v. McCrae*, 839 A.2d 682, 693 (D.C. 2003) (liability for negligent supervision requires antecedent proof of a tort committed by the supervised employee); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 760 (D.C. 2001). ("To invoke this theory of liability it is incumbent upon a party to show that an employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee.") (citation omitted). This antecedent act requirement is not absolute, however.

In *District of Columbia v. Tulin*, 994 A.2d 788, 793-97 (D.C. 2010), plaintiff obtained a negligent supervision jury verdict based on the conduct of two supervisory police officers, not based upon evidence of an antecedent act by the subordinate officer. The two supervisors in *Tulin* authorized an arrest without obtaining "critical" information needed to establish whether the arrest was lawful. *Id.* at 797. Relying on the Restatement, the Court upheld the jury verdict for the plaintiff and explained that "supervisors can surely be negligent by not informing themselves properly and by thus authorizing or failing to prevent an unlawful arrest." *Tulin*, 994 A.2d at 793-97.

Tulin clearly allows for a negligent supervision claim without an antecedent act. This approach makes perfect sense in cases such as this one, where a supervisory official directs a subordinate employee to act in the supervisor's presence. For this tort, the focus is on the supervisor's ability and responsibility to manage or control the subordinate employee. *Compare Brown*, 782 A.2d at 759-60 (upholding summary

judgment for defendant supermarket on a claim of negligent supervision, in part, because no person with supervisory authority saw the incident at issue or had an opportunity to stop it). Indeed in *Tulin*, the Court explained that a

> jury could reasonably find that the District, through [the two Sergeants], was negligent in its duty to supervise [the arresting officer] and to protect Mr. Tulin from a wrongful arrest. . . . [T]he jury could [have] conclude[d] that . . . the sergeants at the scene should have recognized that the investigation was inadequate and that the arrest was unlawful, but that they nevertheless failed to prevent Officer McKoy from making it.

994 A.2d at 800. Applying the Restatement provision and the reasoning from *Tulin* to the facts of the case at bar, the Court finds that the District is not entitled to summary judgment for negligent supervision because the unlawful arrests were ordered by high level officials who knew or should have known that probable cause was lacking for these arrests.

The District next argues Plaintiffs' negligent supervision claim fails because Plaintiffs do not have expert testimony to establish the requisite standard of care. Defendant cites three cases for the proposition that expert testimony is essential where negligent operations, supervision, and training of police officers are at issue. *See Linares v. Jones*, 551 F. Supp.2d 12, 20 (D.D.C. 2008); *Cotton v. District of Columbia*, 541 F. Supp.2d 195, 207 (D.D.C. 2008); *Parker v. Grand Hyatt Hotel*, 124 F. Supp.2d 79, 90 (D.D.C. 2000). These cases do not, however, hold that expert testimony is required in all police negligent supervision cases.

District of Columbia law provides that "[e]xpert testimony is required . . . where the subject presented is 'so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson.'" *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 200 (D.C. 1991) (citation omitted). On the other hand, "[w]here negligent conduct is alleged in a context which is within the realm of common knowledge and everyday experience, the plaintiff is not required to adduce expert testimony . . . ." *Id.* (citations omitted). As this Circuit has recognized, "the factual context matter[s]," when determining the need for expert testimony under District of Columbia law. *Godfrey*, 559 F.3d at 573.

The decision in *Tulin* supports a finding that expert testimony is not required in this case. 994 A.2d at 794-97. As noted above, *Tulin* involved supervising officers whose failure to obtain "critical" information at an accident scene led to an unlawful arrest. *Id.* at 796-97. For example, they failed to obtain information regarding the speed of two vehicles and the distance between the vehicles prior to a rear end collision. *Id.* at 795-96. Citing the simple road safety laws relevant to the accident, the Court held that the case was not one where "lay jurors would be unable to grasp the issues without expert assistance." *Tulin*, 994 A.2d at 795.

Similarly, the instant Court finds that an impartial trier of fact can determine, without the aid of an expert, whether Suber, Netter and the OAG breached the standard of care by directing the defendant officers to arrest Plaintiffs. *See Godfrey*, 559 F.3d at 573 (upholding finding that expert testimony was not required where the supervisor was present when the act was committed and the supervisor had both the

authority and ability to "supervise or control [the subordinate's] behavior"). As in *Tulin*, the statutes here are not complicated and the duty to conduct a proper investigation, as well as the duty to uphold that law, are not "distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." *See Beard*, 587 A.2d at 200.

Accordingly, Plaintiffs' failure to proffer expert testimony is not fatal to their negligent supervision claim. Indeed, Plaintiffs' motion for summary judgment will be granted on said claim and Defendants' motion for summary judgment must be denied.

VII. CONCLUSION

For the reasons set forth above, the Court finds that:

Count I: Section 1983 False Arrest Claims for Unlawful Entry and Disorderly Conduct

a) Defendants' Motion for Summary Judgment will be granted as it relates to Plaintiffs' Section 1983 claims asserted against the officers in their official capacities. Said claims against defendants Espinosa, Newman, Campanale, Parker and Khan in their official capacities will be dismissed with prejudice.

b) Plaintiffs' Motion for Summary Judgment will be granted with respect to Plaintiffs' Section 1983 *unlawful entry* false arrest claims asserted against Defendants Anthony Campanale and Andre Parker in their individual capacities.

c) In all other respects, the parties' Motions for Summary Judgment with respect to Count I will be denied.

Count II: State Law False Arrest Claims for Unlawful Entry and Disorderly Conduct

a) Defendants' Motion for Summary Judgment will be granted as it relates to the state law false arrest claims asserted against the individual officers in their official capacities. Said claims against Defendants Espinosa, Newman, Campanale, Parker and Khan in their official capacities will be dismissed with prejudice.

b) Plaintiffs' Motion for Summary Judgment will be granted with respect to the state law *unlawful entry* false arrest claims asserted against the Defendants District of Columbia, Campanale and Parker.

c) Plaintiffs' Motion for Summary Judgment will be granted with respect to the state law disorderly conduct false arrest claim asserted against the Defendant District of Columbia.

d) In all other respects, the parties' Motions for Summary Judgment with respect to Count II will be denied.

Count III: State Law Negligent Supervision Claim

Plaintiffs' Motion for Summary Judgment will be granted with respect to the state law negligent supervision claim against Defendant District of Columbia The District of Columbia's Motion for Summary Judgment on Count III will be denied.

SO ORDERED.

January 18, 2012

Robert L. Wilkins, United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 9-cv-501 (RLW)

THEODORE WESBY, ET AL.,

Plaintiffs,

vs.

DISTRICT OF COLUMBIA, ET AL.,

Defendants.

ORDER ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

For the reasons set forth in the accompanying Memorandum Opinion, the Court finds that Defendants' Motion for Summary Judgment, (Doc. 31), and Plaintiffs' Motion for Summary Judgment, (Doc. 25), are hereby granted in part and denied in part:

Count I: Section 1983 False Arrest Claims for Unlawful Entry and Disorderly Conduct

a) Defendants' Motion for Summary Judgment is hereby granted as it relates to Plaintiffs' Section 1983 claims asserted against the officers in their official capacities. Said claims against defendants Espinosa, Newman, Campanale, Parker and Khan in their official capacities are hereby dismissed with prejudice.

b) Plaintiffs' Motion for Summary Judgment is hereby granted with respect to Plaintiffs' Section 1983 *unlawful entry* false arrest claims asserted against Defendants Anthony Campanale and Andre Parker in their individual capacities.

c) In all other respects, the parties' Motions for Summary Judgment with respect to Count I are hereby denied.

Count II: State Law False Arrest Claims for Unlawful Entry and Disorderly Conduct

a) Defendants' Motion for Summary Judgment is hereby granted as it relates to the state law false arrest claims asserted against the individual officers in their official capacities. Said claims against Defendants Espinosa, Newman, Campanale, Parker and Khan in their official capacities are hereby dismissed with prejudice.

b) Plaintiffs' Motion for Summary Judgment is hereby granted with respect to the state law *unlawful entry* false arrest claims asserted against the Defendants District of Columbia, Campanale and Parker.

c) Plaintiffs' Motion for Summary Judgment is hereby granted with respect to the state law disorderly conduct false arrest claim asserted against the Defendant District of Columbia.

d) In all other respects, the parties' Motions for Summary Judgment with respect to Count II are hereby denied.

Count III: State Law Negligent Supervision Claim

Plaintiffs' Motion for Summary Judgment is hereby granted with respect to the state law negligent supervision claim against Defendant District of Columbia. The District of Columbia's Motion for Summary Judgment on Count III is hereby denied.

SO ORDERED.

January 18, 2012
Robert L. Wilkins, United States District Judge

APPENDIX C

816 F.3d 96;
2016 U.S. App. LEXIS 2140

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7127

THEODORE WESBY, ET AL.,

Appellees,

v.

DISTRICT OF COLUMBIA, ET AL.,

Appellants.

EDWIN ESPINOSA, OFFICER—METROPOLITAN POLICE DEPARTMENT, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES, ET AL.,

Appellees.

February 8, 2016, Filed

COUNSEL: For Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Antoinette Colbert, Gary Gordon, James Davis, Joseph Mayfield, Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Stanley Richardson, Plaintiffs - Appellees: Gregory L. Lattimer, Esquire, Law Offices of Gregory L. Lattimer, PLLC, Washington, DC.

For District of Columbia, Anthony Campanale, Officer – Metropolitan Police Department, in both his official and individual capacities, Andre Parker, Officer - Metropolitan Police Department, in both his official and individual capacities, Defendants - Appellants: Loren L. AliKhan, Deputy Solicitor General, Todd Sunhwae Kim, Solicitor General, Irvin B. Nathan, Carl James Schifferle, Assistant Attorney General, Office of the Attorney General, District of Columbia, Office of the Solicitor General, Washington, DC.

For Edwin Espinosa, Officer - Metropolitan Police Department, in both his official and individual capacities, J. Newman, Officer - Metropolitan Police Department, in both his official and individual capacities, Faraz Khan, Officer - Metropolitan Police Department, in both his official and individual capacities, Defendants - Appellees: Loren L. AliKhan, Deputy Solicitor General, Office of the Attorney General, District of Columbia, Office of the Solicitor General, Washington, DC.

JUDGES: Before: GARLAND, Chief Judge; HENDERSON,** ROGERS, TATEL, BROWN,** GRIFFITH,** KAVANAUGH,** SRINIVASAN, MILLETT, PILLARD,** AND WILKINS,* Circuit Judges. PILLARD, Circuit Judge, and EDWARDS, Senior Circuit Judge, concurring in the denial of rehearing en banc. KAVANAUGH, Circuit Judge, with whom Circuit Judges HENDERSON, BROWN, and GRIFFITH join, dissenting from the denial of rehearing en banc.

** Circuit Judges Henderson, Brown, Griffith, and Kavanaugh would grant the petition for rehearing en banc.

** Circuit Judges Henderson, Brown, Griffith, and Kavanaugh would grant the petition for rehearing en banc.

** Circuit Judges Henderson, Brown, Griffith, and Kavanaugh would grant the petition for rehearing en banc.

** A statement by Circuit Judge Kavanaugh, with whom Circuit Judges Henderson, Brown, and Griffith join, dissenting from the denial of rehearing en banc, is attached.

** A statement by Circuit Judge Pillard and Senior Circuit Judge Edwards, concurring in the denial of rehearing en banc, is attached. Pursuant to Fed. R. App. P. 35(a), Senior Judge Edwards, a member of the merits panel, did not participate in the vote whether to grant rehearing en banc.

* Circuit Judge Wilkins did not participate in this matter.

OPINION

On Petition for Rehearing En Banc

ORDER

Appellants' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

CONCUR BY: PILLARD

CONCUR

PILLARD, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*, concurring in the denial of rehearing *en banc*: The panel opinion has none of the ambition that Judge Kavanaugh, dissenting from denial of rehearing *en banc*, attributes to it. It does not alter the law of probable cause or the law of qualified immunity. The panel agrees with virtually everything the dissent says about the law. Our disagreement is about the facts.

I.

The dissent accuses us of establishing new rules of law. We have done no such thing. In fact, we view the law the same way the dissent does.

1. The dissent asserts that we created a new rule "that officers are required to believe the statements of suspected trespassers who claim that they have permission to be on the property." Dissent 18. It contends that our opinion obliges officers to accept suspects' implausible protestations of innocence and ignore other, circumstantial evidence of culpability. *Id.* at 9-10. That is not the law, nor did we so hold.

Rather, we agree with the dissent that, if the facts of which officers are aware and the reasonable inferences that arise from those facts cast doubt on a suspect's story, officers need not credit the suspect. *See id.* at 12, 18. Indeed, our opinion specifically acknowledges that officers are "entitled to discredit" a suspect's claims of an "innocent explanation for entry into a house in the face of conflicting evidence," *Wesby v. District of Columbia*, 765 F.3d 13, 21 n.4, 412 U.S. App. D.C. 246 (D.C. Cir. 2014) (citing *Wright v. City of*

Philadelphia, 409 F.3d 595, 603 (3d Cir. 2005)); if other facts give rise to probable cause, the officer may arrest, "notwithstanding exculpatory statements from the suspect," *id.* (quoting *Dahl v. Holley*, 312 F.3d 1228, 1234 (11th Cir. 2002)).

We also acknowledged that circumstantial evidence may "make it reasonable to infer" that a suspect has a culpable state of mind. *Id.* at 22. To reach that conclusion, officers do not need trial-worthy evidence. We expressly noted that "[p]robable cause 'does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.'" *See id.* at 20 (quoting *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). The dissent agrees. *See* Dissent 7 ("To have probable cause to arrest, a police officer does not need proof beyond a reasonable doubt, or even by a preponderance of the evidence, that an individual committed a crime.").

Taking these points together, so long as there is evidence giving rise to probable cause—even if that evidence is only circumstantial and short of preponderant—officers may lawfully arrest, no matter what a suspect claims in his or her own defense. There is nothing novel about our view. The dissent's sampling of cases from across the circuits confirms that it is widely held. *See id.* at 11-14.

2. The dissent worries that our opinion erodes the protection qualified immunity provides officers who must make "on-the-spot credibility judgments" and quickly "resolve difficult mens rea questions." *Id.* at 2, 11. Our first point of agreement should put the dissent at ease—officers are not required to take suspects at their word when they deny their guilt. A second point

also ought to assuage the dissent: If officers mistakenly conclude that there is probable cause, they are nonetheless entitled qualified immunity if their mistake was reasonable. *See Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam). Our opinion does not ignore or weaken that important protection, which gives officers the necessary "breathing room" to perform their difficult, dangerous jobs and safeguard the public. *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149 (2011). It simply finds that a reasonable officer could not conclude, based on the information before *these particular officers*, that there was probable cause.

It is also worth noting that this case is quite unusual, in that the officers did not make any heat-of-the-moment judgment calls about the partygoers' mens rea or whether they were telling the truth about having been invited. First, nothing about the investigation was rushed and nothing about the situation posed any imminent risk. The officers spent two hours on the scene calmly assessing the situation, J.A. 381, and more time back at the station deliberating over which charge to bring. (The officers originally processed the partygoers for unlawful entry, then dropped that charge and, after discussing the case with representatives of the Attorney General's office, processed them for disorderly conduct, then dropped that charge as well. J.A. 45-50.) Second, these defendants did not in fact make any determinations about the partygoers' mindset, because they did not think either one mattered. *See infra* 9 & n.1.

II.

We and the dissent agree on two other clearly established points of law.

1. The dissent does not dispute our rather unexceptional statement that arresting officers need "at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest." *Wesby*, 765 F.3d at 26. When officers lack probable cause to believe that a necessary element of an offense is present, they lack probable cause to arrest. *See id.*; *United States v. Christian*, 187 F.3d 663, 667, 337 U.S. App. D.C. 402 (D.C. Cir. 1999); *accord Wright*, 409 F.3d at 602 ("Whether any particular set of facts suggest that an arrest is justified by probable cause requires an examination of the elements of the crime at issue."). The same is true when the only circumstances officers observe amount to conduct that is privileged by a defense.

Setting aside for the moment its particular application here, the dissent seems to agree with that proposition as a legal matter. *See* Dissent 10-11, 15. The dissent quotes with approval a recent Second Circuit statement of the law that officers must accept a suspect's defense if "'the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs.'" *Id.* at 15 (quoting *Garcia v. Doe*, 779 F.3d 84, 93 (2nd Cir. 2015) (amended opinion)). Our decision fully comports with Garcia. Our own prior decisions and those of other courts are in accord. *See Hutchins v. District of Columbia*, 188 F.3d 531, 535, 338 U.S. App. D.C. 11 (D.C. Cir. 1999) (en banc) (noting that a police officer may detain a minor for violating a curfew law if the "police officer reasonably believes that an offense has occurred under the curfew law and that no defense exists"); *Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 96 (D.C.

1997) (acknowledging the "unusual" possibility of circumstances that, "while undoubtedly proving an unlawful act, nonetheless demonstrated so clearly that the suspect lacked the required intent that the police would not even have probable cause for an arrest"); *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999) (observing that the "law has been clearly established since at least the Supreme Court's decision in *Carroll v. United States*, [267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925)], that probable cause determinations involve an examination of all facts and circumstances within an officer's knowledge at the time of an arrest," which includes an arrestee's "uncontroverted" defense).

2. In addition to agreeing that officers need "some showing" of each element, *Wesby*, 765 F.3d at 22, we and the dissent agree that the key element in this case was whether the partygoers entered a place they *knew or should have known* was off limits. The dissent does not dispute, nor could it, that it is no crime for a person to enter premises without authorization if that person has a bona fide belief that she is permitted to enter. It frames the issue well:

> It is undisputed that the partiers were on private property without permission from an owner or renter, and without other lawful authority. Therefore, this is a case where the actus reus of the crime was complete. The sole issue from the perspective of a reasonable police officer was whether the partiers had the necessary mens rea to commit the crime of trespassing. If the partiers believed that they had permission from a lawful owner or renter to use the house, then the partiers did

not commit the offense of trespassing under D.C. law.

Dissent 9.

At the time of the challenged arrests, the law in the District of Columbia had, indeed, long been clear that in unlawful entry cases the suspect's state of mind matters. *See, e.g., Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989) (affirming because the evidence showed "appellant's intention to be on the premises contrary to [the owner's] will"); *Culp v. United States*, 486 A.2d 1174, 1177 (D.C. 1985) (affirming because "officers could reasonably conclude that appellant knowingly entered 'against the will of . . . the person lawfully in charge'"). By the same token, it had long been clear that if a person has "a bona fide belief" that he is permitted to enter, "he lacks the element of criminal intent required by" the law "and is not guilty of unlawful entry." *Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971); *see McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). Although the *Ortberg* case, which came down after these arrests, stated more precisely the culpable state of mind required to prove unlawful entry, *Ortberg* simply articulated what "decades of case law" had already made "clear"—that the government must "establish that the defendant knew or should have known that his entry was unwanted." *Ortberg v. United States*, 81 A.3d 303, 307 (D.C. 2013). Indeed, the model jury instruction for unlawful entry going back to at least 1993 describes the required state of mind in those terms. *See* Criminal Jury Instructions for the District of Columbia, No. 4.36 (4th ed. 1993) ("The government must prove beyond a reasonable doubt not only that the defendant entered against the will of the lawful occupant of the premises, but also that s/he knew, or

should have known, that s/he was entering against the will of the occupant.").

III.

The only criticism we have of the dissent's view of the law is that it would relieve the officers of their burden to justify an arrest by effectively presuming probable cause if nothing in the record forecloses it. The dissent commits that error in sketching three scenarios, two that it describes as supported by probable cause, and one that it acknowledges is not. Dissent 14-15. The first possibility the dissent identifies is that, although Peaches invited them, the partygoers knew or might have known that she was not renting the house and so could not lawfully invite them there. A second possibility is that the partygoers might have lied to the police when they said that Peaches invited them, and that Peaches then made up a corresponding lie to give her friends cover. In the third scenario, the partygoers told the truth that Peaches invited them, and they had no reason to suspect that she was not authorized to do so. The dissent contends that each scenario is possible, and that "the officers did not have a way to rule out either of the first two scenarios." *Id.* at 15.

We have two responses. First, there is no evidence in the record that suggests that the partygoers and Peaches cooked up a plot to mislead the police, and the dissent points to none. Instead, the dissent simply speculates, "[w]ho knows" whether or how they might have coordinated? *Id.* at 14. Certainly not the officers. They never—neither at the time of the arrest nor during the subsequent litigation—pointed to a circumstance tending to show that the partygoers and Peaches were colluding.

Second, and more fundamentally, in suggesting that a lack of information—a "who knows?" gap—could suffice to support probable cause, the dissent advocates a position that would impermissibly shift the burden of discerning probable cause. Officers may not do what the dissent does—posit that a person is up to no good and then ask whether there is clear reason to rule out any theoretical wrongdoing. *See Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004) ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."); *Adams*, 407 U.S. at 148 ("Probable cause to arrest depends 'upon whether, at the moment the arrest was made . . . the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)). The probable cause requirement, even as flexible and contextual as it appropriately is, authorizes arrest only when the facts and circumstances give officers reason to believe that someone is violating or has violated the law.

The bare, unsupported possibility that an officer *might have* disbelieved the partygoers when they said they had been invited is not ground for arrest--nor for qualified immunity. Contra Dissent 19. The dissent contends that an officer's doubts about a suspect's credibility count as "information" that can controvert evidence dissipating probable cause. *Id.* at 10, 20. We do not disagree with that proposition as a legal matter. When officers actually doubt a suspect's credibility, and when those doubts fairly arise from their observations and the information available to them,

officers may take their doubts into account when assessing whether the totality circumstances support probable case. *See, e.g.*, *McComas v. Brickley*, 673 F.3d 722, 726-27 (7th Cir. 2012); *Wright*, 409 F.3d at 603. The officers in this case, however, did not actually doubt that the partygoers were telling the truth when they said Peaches invited them. In fact, the officers did not think the partygoers' credibility mattered at all. They did not think it mattered because they believed—incorrectly and unreasonably—that the partygoers' state of mind was legally irrelevant.

IV.

Our disagreement with the dissent comes down to our case-specific assessment of the circumstantial evidence in the record.

We found that an officer could not conclude—not even reasonably, though mistakenly—that the partygoers had a culpable state of mind. It is not surprising that the record, consisting of what the officers took note of at the time, lacks evidence of what the partygoers knew, or even what they ought to have known, about whether they had been legitimately invited into the house. At the time of the arrest, and even in this litigation, the defendants misunderstood the clearly established elements of unlawful entry. They believed (erroneously) that it did not matter what the partygoers knew or did not know about their permission to be at the premises. Once the owner told the officers he had not yet rented the house to Peaches and he had not allowed the guests to attend a party there, the officers believed they had all they needed.[1]

---

[1] When opposing counsel asked Sergeant Suber at his deposition if it mattered "whether or not [the partygoers] believed, based upon what Peaches told them, that they had the

Of course, even though the defendant officers in this case did not seek to determine whether the partygoers themselves knew or should have known that they were not authorized to be present at the house, if the information known to the officers when they made the arrests nonetheless fairly suggested that the partygoers were or should have been aware that they were unwelcome, the arrests would have been lawful. *See Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *United States v.*

---

right to be there," he answered, "Peaches nor the other individuals occupying that location did not have the right to be there." J.A. 48; *see id.* at 129 ("Q: And so what I'm trying to understand is why did you reach that conclusion [that it was a lawful arrest] when you knew that Peaches had given them permission to be there? [Suber]: Because Peaches didn't have permission to be there."); *see also id.* at 99 (deposition testimony of Defendant Officer Parker explaining that Sergeant Suber decided to arrest everyone because the owner had said that nobody had his permission to be in the house).

Even in their summary judgment papers, the defendants continued to assert the irrelevance of the partygoers' mindset. The defendants acknowledged that "each of [the partygoers] admitted that they were social guests," but stressed that "this statement is not material" because none of the plaintiffs owned the property and liability turns on "whether MPD Officers reasonably believed that the plaintiffs were not the owners and did not have a possessory interest in the property." J.A. 59 (Defs.' Resp. to Pls.' Statement of Facts, ECF No. 30, Ex. 1 at 2). In their rehearing petition before this court as well, the defendants suggest that it somehow was not clearly established that the offense of unlawful entry includes a state of mind requirement. *See* Pet. Reh'g En Banc 12 (contending that the panel erred because it "found the law clearly established 'that probable cause required some evidence that the Plaintiffs knew or should have known that they were entering against the will of the lawful owner'" (quoting *Wesby*, 765 F.3d at 27)). As discussed in the court's opinion and in the text, *supra* 5-6, that is a misstatement of clearly established law.

Bookhardt, 277 F.3d 558, 565, 349 U.S. App. D.C. 317 (D.C. Cir. 2002); *United States v. Joyner*, 492 F.2d 655, 656, 160 U.S. App. D.C. 389 (D.C. Cir. 1974) (per curiam) ("[A]n arrest will be upheld if probable cause exists to support arrest for an offense that is not denominated as the reason for the arrest by the arresting officer."). And if the facts in the record could at least arguably give rise to probable cause, the defendants would be entitled to qualified immunity. *See Hunter*, 502 U.S. at 227; *Wardlaw v. Pickett*, 1 F.3d 1297, 1304, 303 U.S. App. D.C. 130 (D.C. Cir. 1993).

The dissent thinks an officer in the defendants' position could reasonably believe there was probable cause. Dissent 14-15. For the reasons explained in our opinion, we disagree that the record here supports probable cause, either actually or arguably. That is the extent of our disagreement, no more, no less. Our dispute—whether these particular defendants are entitled to qualified immunity on the plaintiff's Fourth Amendment claim—is entirely "fact-bound," *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779, 191 L. Ed. 2d 856 (2015) (Scalia, J., concurring in part and dissenting in part), and therefore hardly deserves the dissent's doomsaying. As our nearly complete agreement with the dissent on the governing principles underscores, we did not invent or invert any law to reach the result in this case. And the thinness of the record is quite anomalous, as it stems from the officers' legal error at the scene. We accordingly concur in the denial of rehearing *en banc*.

DISSENT BY: KAVANAUGH

DISSENT

KAVANAUGH, *Circuit Judge*, with whom *Circuit Judges* HENDERSON, BROWN, and GRIFFITH join, dissenting from the denial of rehearing en banc: In a series of recent qualified immunity cases, the Supreme Court has repeatedly told the courts of appeals that police officers may not be held liable for damages unless the officers were "plainly incompetent" or "knowingly violate[d]" clearly established law. *Carroll v. Carman*, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311, 314 (2014) (internal quotation marks omitted). The Supreme Court "often corrects lower courts when they wrongly subject individual officers to liability." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3, 191 L. Ed. 2d 856, 866 n.3 (2015). Indeed, in just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals. *See Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (summary reversal); *Taylor v. Barkes*, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015) (summary reversal); *Sheehan*, 135 S. Ct. 1765, 191 L. Ed. 2d 856; *Carroll*, 135 S. Ct. 348, 190 L. Ed. 2d 311 (summary reversal); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Wood v. Moss*, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013) (summary reversal); *Reichle v. Howards*, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012); *Ryburn v. Huff*, 132 S. Ct. 987, 181 L. Ed. 2d 966 (2012) (summary reversal); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

In my view, the panel opinion in this case contravenes those emphatic Supreme Court directives. Two D.C. police officers have been held liable for a total of almost $1 million. That equates to about 20 years of after-tax income for the officers, not to mention the harm to their careers.[1] For what? For arresting for trespassing a group of people who were partying late at night with drugs and strippers *in a vacant house that the partiers did not own or rent*. To be sure, the partiers claimed that they had permission from a woman named Peaches to use the vacant house. But the officers soon learned that Peaches herself did not have permission to use the house. And the officers reasonably could have thought that the partiers probably knew as much. Therefore, the officers reasonably could have concluded that there was probable cause to arrest the partiers for trespassing. The officers were not "plainly incompetent" and did not "knowingly violate" clearly established law when they made these arrests. The officers are entitled to qualified immunity.

The Supreme Court has reminded us that qualified immunity is important "to society as a whole." *Sheehan*, 135 S. Ct. at 1774 n.3, slip op. at 10 n.3 (internal quotation marks omitted). That holds true in this case. The Attorney General for the District of Columbia has filed a vigorous petition for rehearing en banc. The Attorney General's petition convincingly

---

[1] As the Supreme Court has said: "Whatever contractual obligations" the District of Columbia "may (or may not) have to represent and indemnify the officers are not our concern. At a minimum, these officers have a personal interest in the correctness of the judgment below, which holds that they may have violated the Constitution." *Sheehan*, 135 S. Ct. at 1774 n.3, slip op. at 10 n.3.

explains how the panel opinion will negatively affect the ability of D.C. police officers to make the on-the-spot credibility judgments that are essential for officers to perform their dangerous jobs and protect the public. I would grant the Attorney General's petition.

Responding to this dissent, the panel majority says that it agrees with this dissent about the law and that our disagreement with one another is simply about how the law applies to the facts. But that is true in most qualified immunity cases. At a high enough level of generality, the law of qualified immunity is settled, as are the relevant Fourth Amendment principles. But what has concerned the Supreme Court in numerous cases is how lower courts apply the general qualified immunity and Fourth Amendment principles to the facts of particular cases.[2] That is my concern here as well.

I

At about 1:00 a.m. on March 16, 2008, the District of Columbia's Metropolitan Police Department received a complaint about loud music and possible illegal activity at a house east of the Anacostia River

---

[2] In similar en banc circumstances, another court of appeals recently reconsidered a panel opinion about qualified immunity in a false arrest case. In *Garcia v. Jane & John Does* 1-40, 779 F.3d 84 (2d Cir. 2015), Judge Calabresi and Judge Lynch, over the dissent of Judge Livingston, originally denied the officers' qualified immunity motion. After the officers filed a strongly worded petition for rehearing en banc, the three-judge panel unanimously issued an amended opinion holding that the police officers were entitled to qualified immunity. *See id.* at 87. Many of the issues in that Second Circuit case resemble the issues in this case. I respectfully suggest that similar re-examination of the original panel opinion would have been warranted here.

between Benning Road and East Capitol Street, a short distance northeast of RFK Stadium. According to the caller, the house where the party was taking place had been "vacant for several months." Metropolitan Police Department Arrest/Prosecution Report, reprinted in Joint Appendix ("J.A.") 73.

Police officers quickly responded to the scene. The officers heard music coming from inside the house. After knocking on the door and entering, the officers observed that the house was sparsely furnished and "in disarray," consistent "with it being a vacant property." *Id.* In the living room, they saw a large group of people engaged in behavior consistent "with activity being conducted in strip clubs for profit." *Id.* Several women were "dressed only in their bra and thong with money hanging out" of "their garter belts." Officer Khan Interrogatory, J.A. 163. The officers smelled marijuana. When the officers entered, the partiers initially scattered into other rooms.

The officers talked to everyone present in the house. The 21 people who were there told the officers conflicting stories about what they were doing on the property. Some said they were celebrating a birthday party. Most said it was a bachelor party. But the guest of honor was not identified to the officers.

The people in the house also gave conflicting stories about who had supposedly given them permission to use the house. No one could identify the owner of the house. Several people said that they had been invited by other people. Some said that a woman known as "Peaches" or "Tasty" had given the partiers permission to use the house. But Peaches was not present at the house.

Notwithstanding the conflicting stories and suspicious circumstances, the officers did not immediately arrest the partiers for trespassing. Rather, the officers took time to further investigate the situation. The officers contacted both Peaches and the owner of the house. They reached Peaches by phone. The officers thought that Peaches was evasive. Peaches said that she had given the partiers permission to use the house. But when the officers asked who in turn had given Peaches authority to use the house, Peaches responded that she was "possibly renting the house from the owner," who was "fixing the house up for her." *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 25-26 (D.D.C. 2012) (Deposition of Sergeant Suber). When pressed by the officers, Peaches finally admitted that she did not have authority to use the house. She refused to come to the house because she said that she would be arrested. She hung up the phone on the officers.

The officers then called the owner of the house, Mr. Hughes. Mr. Hughes told the police officers that no one—including Peaches—had authority to use the house.

After they had assessed the scene, talked to the partiers, and gathered information from Peaches and Mr. Hughes, the police officers arrested the people in the house for trespassing, an offense known as "unlawful entry" under D.C. law. Trespassing is a minor offense under D.C. law.[3] Prosecutors later decided not to pursue charges against the partiers.

---

[3] Under D.C. law, trespassing is punishable by a maximum jail sentence of 180 days and a maximum fine of $1,000. D.C. Code § 22-3302.

After all of the charges arising out of the incident had been dropped, many of the 21 people who had been arrested turned around and sued the police officers and the District of Columbia under Section 1983 and D.C. law. The plaintiffs claimed that the officers had made the arrests without probable cause. The officers countered that they had probable cause to arrest the plaintiffs for trespassing. The officers also asserted that, in any event, they were entitled to qualified immunity for two distinct reasons. First, it was at least reasonable for the officers to believe that they had probable cause to arrest under these factual circumstances. And second, the officers did not contravene any clearly established law by making these arrests for trespassing.

On cross motions for summary judgment, the District Court concluded that the officers did not have probable cause to arrest and, moreover, were not entitled to qualified immunity. The District Court granted summary judgment to the plaintiffs. After a trial on damages, a jury awarded the plaintiffs $680,000. Attorney's fees brought the total award to almost $1 million. The police officers and the District of Columbia are jointly and severally liable for that total.[4]

---

[4] For purposes of Section 1983 liability, the District of Columbia is considered a municipality. *See People for the Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 425, 364 U.S. App. D.C. 386 (D.C. Cir. 2005). As a municipality, the District of Columbia "cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior theory*." *Singletary v. District of Columbia*, 766 F.3d 66, 72, 412 U.S. App. D.C. 351 (D.C. Cir. 2014) (quoting *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)) (internal quotation marks omitted). The

The District of Columbia and the police officers appealed to this Court. A panel of this Court affirmed the judgment of the District Court. The panel opinion concluded that the police officers did not have probable cause to arrest the plaintiffs and were not entitled to qualified immunity. Judge Brown dissented. The District of Columbia and the police officers sought rehearing en banc. I would grant en banc review.

II

The police officers persuasively argue that they had probable cause to arrest the partiers for trespassing. But regardless of whether the officers had probable cause, they are entitled to qualified immunity because they at least *reasonably could have believed* that they had probable cause. Could the officers have walked away from the vacant house filled with partiers? Sure. Could they have broken up the party and then left? No doubt. Indeed, in retrospect, that might well have been a better decision. But did the officers act in a "plainly incompetent" manner or "knowingly violate" clearly

---

District of Columbia may be held liable under Section 1983 only when the execution of a government "policy or custom" inflicts an injury for which the District of Columbia "as an entity is responsible under § 1983." *Id.* (quoting *Monell*, 436 U.S. at 694) (internal quotation marks omitted).

In this case, the plaintiffs did not allege that a government policy or custom led to the arrests. Because respondeat superior is not a theory of liability in Section 1983 cases against municipalities, the District of Columbia was therefore not liable for the Section 1983 claims. The District of Columbia instead was liable for the D.C. law claims. The damages award was not apportioned between the Section 1983 and D.C. law claims. The District of Columbia and the two officers are jointly and severally liable for the full amount.

established law by making these arrests for trespassing? No.

To begin with, the probable cause standard itself gives police officers substantial leeway when determining whether to make an arrest. As the Supreme Court has explained, probable cause is a "fluid concept" that turns on "factual and practical considerations of everyday life on which reasonable and prudent" persons, "not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231-32, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (internal quotation marks omitted). Probable cause is "not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. To have probable cause to arrest, a police officer does not need proof beyond a reasonable doubt, or even by a preponderance of the evidence, that an individual committed a crime. As the Supreme Court has emphasized: "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence" have "no place in the [probable-cause] decision." *Florida v. Harris*, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61, 67 (2013) (alteration in original) (internal quotation marks omitted).

In damages suits against officers, the doctrine of qualified immunity adds an extra dose of judicial deference to our review of the officer's probable cause determination. As a general matter, qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments" and "protects all but the plainly incompetent or those who knowingly violate the law." *Carroll v. Carman*, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311, 314 (2014) (internal quotation marks omitted). The "crucial question" is "whether the

official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056, 1069 (2014).

In applying the qualified immunity doctrine to the issue of probable cause to make arrests, the Supreme Court has said that officers "who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (internal quotation marks omitted); *see also Wardlaw v. Pickett*, 1 F.3d 1297, 1304, 303 U.S. App. D.C. 130 (D.C. Cir. 1993). In accord with that Supreme Court precedent, most courts of appeals—including our Court—have ruled that officers may not be held liable for damages for allegedly wrongful arrests so long as they had "arguable probable cause" to make the arrest. *See, e.g.*, *Moore v. Hartman*, 644 F.3d 415, 422, 396 U.S. App. D.C. 28 (D.C. Cir. 2011), *vacated on other grounds*, 132 S. Ct. 2740, 183 L. Ed. 2d 612 (2012); *Cox v. Hainey*, 391 F.3d 25, 33 (1st Cir. 2004); *Garcia v. Jane & John Does* 1-40, 779 F.3d 84, 92 (2d Cir. 2015); *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 207 (5th Cir. 2009); *Greene v. Barber*, 310 F.3d 889, 898 n.2 (6th Cir. 2002); *McComas v. Brickley*, 673 F. 3d 722, 725 (7th Cir. 2012); *Ulrich v. Pope County*, 715 F.3d 1054, 1059 (8th Cir. 2013); *Blankenhorn v. City of Orange*, 485 F.3d 463, 475 (9th Cir. 2007); *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014); *Morris v. Town of Lexington Alabama*, 748 F.3d 1316, 1324 (11th Cir. 2014).

Therefore, in suits alleging a lack of probable cause to arrest, officers are not liable if they arguably had probable cause—that is, if the officer *reasonably could have believed* that there was probable cause to arrest.

As a result, the qualified immunity question in this case is not whether the officers had probable cause to arrest the partiers at the house. Rather, the question is whether the officers *reasonably could have believed* that they had probable cause to arrest for trespassing a group of people who were having a party late at night with strippers and drugs in a vacant house that none of the partiers owned or rented, notwithstanding the partiers' claims that they had permission from a woman named Peaches to use the house.

The qualified immunity question in this case is readily answered by a few basic principles of criminal law and procedure. Under D.C. law, it is unlawful to enter private property without permission from the owner or renter, or without other lawful authority. *See Ortberg v. United States*, 81 A.3d 303, 306-07 (D.C. 2013). It is undisputed that the partiers were on private property without permission from an owner or renter, and without other lawful authority. Therefore, this is a case where the actus reus of the crime was complete. The sole issue from the perspective of a reasonable police officer was whether the partiers had the necessary mens rea to commit the crime of trespassing. If the partiers believed that they had permission from a lawful owner or renter to use the house, then the partiers did not commit the offense of trespassing under D.C. law. *See id.* at 308-09.

The only question in this case, then, is whether the officers could reasonably disbelieve the partiers when the partiers said that they thought they had permission to use the house.

In a case like this where the actus reas is complete and the sole issue is the defendant's mens rea, police officers often must make credibility assessments on the spot, sometimes in difficult circumstances. In

those situations, are police officers always required to believe the statements of the suspects—in this case, the partiers in the house? Of course not. Yet the panel opinion seems to say yes, at least for this kind of case. According to the panel opinion, "in the absence of any conflicting information," a police officer does not have probable cause to arrest people for trespassing if those people claim that they were invited by "someone with apparent (if illusory) authority." *Wesby v. District of Columbia*, 765 F.3d 13, 21, 412 U.S. App. D.C. 246 (D.C. Cir. 2014). And under the panel's approach, even if a reasonable police officer could have doubted the credibility of the people claiming to have been invited to the house, those credibility doubts do not count as "conflicting information." See id.

The panel opinion's approach is not and has never been the law. When police officers confront a situation in which people appear to be engaged in unlawful activity, the officers often hear a variety of mens rea-related excuses. "The drugs in my locker aren't mine." "I don't know how the loaded gun got under my seat." "I didn't realize the under-aged high school kids in my basement had a keg." "I wasn't looking at child pornography on my computer, I was hacked." "I don't know how the stolen money got in my trunk." "I didn't see the red light." "I punched my girlfriend in self-defense."

But in the heat of the moment, police officers are entitled to make reasonable credibility judgments and to disbelieve protests of innocence from, for example, those holding a smoking gun, or driving a car with a stash of drugs under the seat, or partying late at night with strippers and drugs in a vacant house without the owner or renter present. As Judge Brown said, the law does not require officers "to credit the

statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims." *Wesby*, 765 F.3d at 36 (Brown, J., dissenting). And as the Second Circuit recently stated: A police officer is required to accept a suspect's *mens rea*-related defense only if, among other things, "the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs." *Garcia*, 779 F.3d at 93.

Almost every court of appeals has recognized that officers cannot be expected to *definitively* resolve difficult mens rea questions in the few moments in which officers have to decide whether to make an arrest. Consider the following sample:

- "Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Amobi v. D.C. Department of Corrections*, 755 F.3d 980, 990, 410 U.S. App. D.C. 338 (D.C. Cir. 2014) (internal quotation marks omitted).
- The "practical restraints on police in the field are greater with respect to ascertaining intent and, therefore, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great." *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004).
- "It is up to the factfinder to determine whether a defendant's story holds water, not

the arresting officer. . . . Once officers possess facts sufficient to establish probable cause, they are neither required nor allowed to sit as prosecutor, judge or jury. Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence." *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir. 1989).

- "Absent a confession, the officer considering the probable cause issue in the context of crime requiring a mens rea on the part of the suspect will always be required to rely on circumstantial evidence regarding the state of his or her mind." *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000).

- "The probable cause inquiry looks to the totality of the circumstances; the standard does not require that officers correctly resolve conflicting evidence or that their determinations of credibility, were, in retrospect, accurate." *Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2005).

- In "considering the totality of the circumstances," a defendant's "innocent explanations for his odd behavior cannot eliminate the suspicious facts from the probable cause calculus." *Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (internal quotation marks omitted).

- An investigator's "failure to make a further investigation into the suspect's state of mind does not constitute lack of probable cause if

all objective elements of a crime reasonably appear to have been completed." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (internal quotation marks omitted).

- Police are "under no obligation to give any credence to a suspect's story . . . if the facts as initially discovered provide probable cause." *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999) (internal quotation marks omitted).

- "Many putative defendants protest their innocence, and it is not the responsibility of law enforcement officials to test such claims once probable cause has been established." *Spiegel v. Cortese*, 196 F.3d 717, 724 (7th Cir. 1999).

- "When an officer is faced with conflicting information that cannot be immediately resolved," the officer "need not rely on an explanation given by the suspect" and "may have arguable probable cause to arrest a suspect." *Royster v. Nichols*, 698 F.3d 681, 688 (8th Cir. 2012) (internal quotation marks omitted).

- "Rarely will a suspect fail to proffer an innocent explanation for his suspicious behavior. The test is not whether the conduct under question is consistent with innocent behavior; law enforcement officers do not have to rule out the possibility of innocent behavior." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009) (internal quotation marks omitted).

- The police officers "were not required" to forgo arresting the defendant "based on initially discovered facts showing probable cause simply because" the defendant "offered a different explanation." *Marx v. Gumbinner*, 905 F.2d 1503, 1507 n.6 (11th Cir. 1990).

Here, in the brief time in which the officers had to decide whether to make arrests, they could not definitively resolve the difficult question of the partiers' mens rea. Mr. Hughes, the owner of the house, told the police officers that no one had authority to use the house. At the same time, Peaches told the officers that she had given the partiers permission to use the house. But there were holes in Peaches's story.

Under these circumstances, a reasonable officer could interpret the situation in at least three different ways. *First*, even if Peaches "invited" the partiers to use the house, maybe the partiers still knew that Peaches did not really have lawful authority to use the vacant house. In other words, maybe the partiers were not unwittingly duped by Peaches but instead knew or suspected that Peaches was not renting the house and did not have authority to invite the partiers there. *Second*, maybe the partiers were lying when they said that Peaches had given them permission to use the house, and maybe Peaches then played along and supplied cover for her friends when the officers reached her on the phone. (Did someone from the party text Peaches first to give her a heads-up? Who knows.) *Third*, maybe the partiers were telling the whole truth and were unwittingly misled by Peaches into thinking that she had authority over the house.

In the first two scenarios, a reasonable officer would have probable cause to arrest the partiers for trespassing. In the third scenario, a reasonable officer would not have probable cause to arrest.

But at the time of the arrests, the officers did not have a way to rule out either of the first two scenarios. After all, a police officer is required to accept a suspect's mens rea-related defense only if, among other things, "the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs." *Garcia*, 779 F.3d at 93. In this case, the officers had several reasons to doubt that the partiers were telling the truth when they claimed that Peaches had given them permission to use the house. The partiers were in a vacant house late at night without the owner or renter present. The partiers gave conflicting explanations for what they were doing at the house, and about who had supposedly given them permission to be there. The police officers also had several reasons to doubt that Peaches was telling the truth. When the officers contacted Peaches, she refused to come to the house because she said she would be arrested, and she gave conflicting accounts of her authority over the house.

Of course, maybe further investigation would ultimately establish that the third scenario was in fact what had happened. Maybe the partiers had been unwittingly misled by Peaches into thinking that she had authority over the house. But that was not the only reasonable interpretation of the situation at the time of the arrests. And once "a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every

theoretically plausible claim of innocence before making an arrest." *Amobi*, 755 F.3d at 990 (internal quotation marks omitted).

In short, the officers were required to make an on-the-spot credibility determination in a situation far removed from the serenity and unhurried decision-making of an appellate judge's chambers. Under the circumstances, it was entirely reasonable for the officers to have doubts about the partiers' story and to conclude that there was probable cause to arrest the partiers for trespassing. The police officers are entitled to qualified immunity.[5]

III

The police officers are also entitled to qualified immunity for a second, independent reason. At the time the officers made the arrests here, the arrests violated no clearly established statutory or constitutional right. Any such right was created by the panel opinion in this case—years after the officers made the arrests.

---

[5] Qualified immunity examines whether police officers' actions are "*objectively* reasonable," not whether police officers *subjectively* believe that their actions are reasonable. *Moore*, 644 F.3d at 423 n.7 (emphasis added) (quoting *Wardlaw*, 1 F.3d at 1305) (internal quotation marks omitted). The District Court's opinion noted that a few of the police officers at the scene "erroneously believed that the question of whether Plaintiffs had been invited onto the property was irrelevant." *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 38 n.15 (D.D.C. 2012). The panel majority's concurrence in the denial of rehearing en banc similarly highlights the officers' subjective beliefs. Concurrence 3, 8-9 & n.1. But because qualified immunity is an objective inquiry, an officer's subjective belief about the law is not relevant to the qualified immunity issue.

The Supreme Court has stated many times that officers are entitled to qualified immunity unless a plaintiff can show that "the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069 (2014) (internal quotation marks omitted); *see also Taylor v. Barkes*, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78, 81 (2015) (summary reversal); *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856, 866 (2015); *Carroll v. Carman*, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311, 314 (2014) (summary reversal); *Wood v. Moss*, 134 S. Ct. 2056, 2061, 188 L. Ed. 2d 1039, 1044 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 4, 187 L. Ed. 2d 341, 343 (2013) (summary reversal); *Reichle v. Howards*, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985, 992 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149, 1155 (2011).

"To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Taylor*, 135 S. Ct. at 2044, slip op. at 4 (internal quotation marks omitted). The Supreme Court has emphasized that courts must "define the clearly established right at issue on the basis of the specific context of the case." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895, 901 (2014) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)) (internal quotation marks omitted). The Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *al-Kidd*, 131 S. Ct. at 2084, slip op. at 10. "Qualified immunity is no immunity at all if clearly established law can simply be defined" at a high level of generality. Sheehan, 135 S. Ct. at 1776, slip op. at 13 (internal quotation marks omitted).

That longstanding rule is one manifestation of the law's general concern about retroactive punishment or liability. *See generally Landgraf v. USI Film Products*, 511 U.S. 244, 265-67, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). It would be unfair for a court to impose monetary liability on a police officer by creating a new legal rule and then applying that new rule retroactively to punish the officer's conduct. Without "fair notice, an officer is entitled to qualified immunity." *Sheehan*, 135 S. Ct. at 1777, slip op. at 15 (internal quotation marks omitted). Because "the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004); *see also Taylor*, 135 S. Ct. at 2045, slip op. at 5 (clearly established precedent must put officials "on notice of any possible constitutional violation"); *Plumhoff*, 134 S. Ct. at 2023, slip op. at 13 ("We did not consider later decided cases" when determining whether an officer violated clearly established law because those cases "'could not have given fair notice'" to the officer.).

At the time of the arrests here, no case had said that officers are required to believe the statements of suspected trespassers who claim that they have permission to be on the property. On the contrary, as explained above, it was and is settled law that officers do not automatically have to believe a suspect's excuses when the officers catch the suspect in the midst of an activity that otherwise appears to be illegal. And in the trespassing context in particular, the most relevant D.C. trespassing cases *supported*

arrest in this kind of case. *See Artisst v. United States*, 554 A.2d 327, 330 n.1 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967).

In *Artisst v. United States*, for example, the defendant argued that the evidence was not sufficient for a jury to convict him for trespassing in a Georgetown University dorm. 554 A.2d at 329. Artisst claimed that he had entered the building to buy soccer equipment from a dorm resident and that he therefore lacked the necessary intent to commit unlawful entry. *Id.* The D.C. Court of Appeals upheld the conviction, finding that a jury could disbelieve Artisst's explanation. *See id.* at 330 n.1. But under the panel opinion here, the police presumably could not even have arrested *Artisst*, much less a jury have convicted him.

Similarly, in *McGloin v. United States*, the defendant challenged his conviction for trespassing in an apartment building. 232 A.2d at 90. *McGloin* told the arresting officer that he had entered the building to look for his cat. *Id.* *McGloin* later told the same officer that he had entered the building to look for a friend. *Id.* The D.C. Court of Appeals upheld McGloin's conviction, noting that although "one who enters for a good purpose and with a bona fide belief of his right to enter is not guilty" of trespassing, this "is not such a case." *Id.* at 91. But again, under the panel opinion here, the police presumably could not even have arrested McGloin, much less a jury have convicted him.

The panel opinion sweeps that D.C. Court of Appeals case law under the rug. The panel opinion does not analyze *Artisst*, and it distinguishes *McGloin* as "merely" recognizing that under certain circumstances, it is "reasonable to infer an interloper's intent to enter against the will of the owner." *Wesby v.*

District of Columbia, 765 F.3d 13, 22, 412 U.S. App. D.C. 246 (D.C. Cir. 2014).

But the D.C. Court of Appeals case law is on point. In my opinion, that case law clearly *permits* police officers to arrest a person for trespassing even when that person claims to have the right to be on the property, if a reasonable officer could disbelieve the suspected trespasser. If juries in trespassing cases can refuse to credit defendants' explanations for their unlawful presence in buildings, police officers surely can do the same. After all, the standard of proof for convictions is beyond a reasonable doubt, but the standard for an arrest is the far lesser showing of probable cause. *See Florida v. Harris*, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61, 67 (2013).

But even apart from those D.C. Court of Appeals decisions, one thing is crystal clear: No decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances. This should have been a fairly easy case for qualified immunity. Instead, the panel opinion did what the Supreme Court has repeatedly told us not to do: The panel opinion created a new rule and then applied that new rule retroactively against the police officers. The panel opinion held that "in the absence of any conflicting information," officers do not have probable cause to arrest people for trespassing if those people claim that they were invited by "someone with apparent (if illusory) authority." *Wesby*, 765 F.3d at 21. On top of that, the panel opinion added a dubious gloss to its novel rule: Even if a reasonable police officer could have doubted the credibility of the trespassers who claimed to be invitees, those credibility doubts do not count as "conflicting information." What case had ever articulated such a counterintuitive rule? Crickets.

Whatever the merits of the panel opinion's new rule—and I think it is divorced from the real world that police officers face on a regular basis—it is still a new rule. And as the Supreme Court has shouted from its First Street rooftop for several years now, qualified immunity protects officers from personal liability for violating rules that did not exist at the time of the officers' actions. *See, e.g.*, *Sheehan*, 135 S. Ct. at 1777, slip op. at 15; *Plumhoff*, S. Ct. at 2023, slip op. at 13-14; *Stanton*, 134 S. Ct. at 7, slip op. at 8.[6] The police officers in this case did not violate clearly established law when they arrested the partiers. The officers are entitled to qualified immunity.[7]

---

[6] To be sure, "in an obvious case," general constitutional principles "can clearly establish the answer, even without a body of relevant case law." *Brosseau*, 543 U.S. at 199 (internal quotation marks omitted). For example, the Supreme Court concluded that handcuffing a prison inmate to a hitching post for seven hours in the sun and without water was an "obvious" violation of the *Eighth Amendment's* prohibition on cruel and unusual punishment. *Hope v. Pelzer*, 536 U.S. 730, 738, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). But the case before us now is hardly an "obvious" case of unconstitutionality. Arresting partiers late at night in a vacant house for trespassing when police officers could reasonably doubt that the partiers had authority to use the house is far from an "obvious" violation of constitutional rights by police officers.

[7] The plaintiffs brought suit against the police officers not only under Section 1983 but also under D.C. law. Under D.C. law, a police officer is not liable for the tort of false arrest if the police officer had probable cause to make the arrest, or "if the officer can demonstrate that (1) he or she believed, in good faith, that his [or her] conduct was lawful, and (2) this belief was reasonable." *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012) (alteration in original) (internal quotation marks omitted). Under D.C. law, then, a police officer is entitled to immunity from a false arrest suit if the officer both (i) *reasonably could have believed* that there was probable cause to arrest and (ii) *subjectively*

* * *

The qualified immunity doctrine affords police officers room to make reasonable judgments about whether they have probable cause to make arrests. The Supreme Court has emphasized that the doctrine protects all but the plainly incompetent or those who knowingly violate clearly established law. The officers in this case were not plainly incompetent, nor did they knowingly violate clearly established law. Anything but. Even if the officers ultimately were wrong in concluding that they had probable cause (and I do not think they were wrong), it was at least reasonable for the officers to believe that they had probable cause under the circumstances and applicable law. They should not be subject to $1 million in damages and fees for their on-the-spot decision to make these

---

believed in good faith that there was probable cause to arrest. As the D.C. Court of Appeals has held, that "standard resembles the section 1983 probable cause and qualified immunity standards," with "the added clear articulation of the requirement of good faith." *District of Columbia v. Minor*, 740 A.2d 523, 531 (D.C. 1999).

This opinion has analyzed the objective aspect of the standard. As to the subjective aspect, the two defendant police officers in this case, Officers Parker and Campanale, believed in good faith that they had probable cause to make the arrests because the officers were unable to definitively determine if the partiers were telling the truth when they claimed to have permission to use the house. Officer Parker indicated that the officers made the arrests because "one person said" that the partiers "didn't have the right" to use the house, and "one person said" that the partiers "did have the right" to use the house. Deposition of Officer Parker, J.A. 99. Officer Campanale similarly stated that the officers arrested the partiers because "[n]obody could determine who was supposed to be inside the residence," and because the partiers were "present inside of a location that" the partiers did "not have permission to be in." Deposition of Officer Campanale, J.A. 124.

trespassing arrests. To be sure, I do not dismiss the irritation and anguish, as well as the reputational and economic harm, that can come from being arrested. Police officers should never lightly take that step, and the courts should not hesitate to impose liability when officers act unreasonably in light of clearly established law. But that is not what happened here, not by a long shot. I respectfully dissent from this Court's decision not to rehear this case en banc.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 16 2016
OFFICE OF THE CLERK

No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

THEODORE WESBY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TED J. WILLIAMS
(Counsel of Record)
LAW OFFICES OF GREGORY L. LATTIMER
1200 G Street, N.W.
Suite 800
Washington, DC 20005
Telephone: +1.202.434.4513
Facsimile: +1.866.764.6442
lattlaw@aol.com

Counsel for Respondents

QUESTIONS PRESENTED

Metropolitan Police Department officers arrested for unlawful entry over sixteen individuals (Respondents here) who had gathered at a home in the District of Columbia. Under District of Columbia law, the offense of unlawful entry requires a culpable mental state. Specifically, an individual is guilty of the crime only if he knew or should have known that he entered a property "against the will of the lawful occupant or of the person lawfully in charge thereof" and intended to act in the face of that knowledge. D.C. Code § 22-3302; *see Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013); *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989). At the scene, Respondents informed the responding officers that they had been invited to the house by a woman whom they reasonably believed to be its lawful occupant. That woman confirmed to the officers by telephone that she had invited them. The officers, however, subsequently learned that she was not in fact a lawful resident of the premises.

The questions presented are:

1. Whether the officers had probable cause to arrest Respondents for unlawful entry under District of Columbia law when the available facts indicated that Respondents believed they had lawful authority to enter the premises.

2. Whether the officers were appropriately denied qualified immunity because it was clearly established at the time of arrest that

police lack probable cause to arrest for unlawful entry when there is no evidence the arrestee has the requisite culpable mental state.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 2

A. Factual Background 2

B. District Court Proceedings 4

C. Court of Appeals Proceedings 5

REASONS FOR DENYING THE PETITION 7

I. PETITIONERS ASK THIS COURT TO ENGAGE IN MERE ERROR CORRECTION OF THE COURT OF APPEALS' FACTBOUND PROBABLE CAUSE DETERMINATION 7

A. The Court of Appeals Applied the Correct Probable Cause Standard 7

B. The Court of Appeals' Determination That There Was No Probable Cause Was Correct; In Any Event, Petitioners Do No More Than Challenge the Application of Settled Law to the Facts of This Case 16

C. The Petition Does Not Present a Question of Nationwide Importance 25

TABLE OF CONTENTS
(continued)

Page

II. THE COURT OF APPEALS APPLIED THE CORRECT QUALIFIED IMMUNITY ANALYSIS, AND ITS DENIAL OF QUALIFIED IMMUNITY WAS CORRECT 26

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Alabama v. White,
496 U.S. 325 (1990) 8

Anderson v. Creighton,
483 U.S. 635 (1987) 27

Artisst v. United States,
554 A.2d 327 (D.C. 1989) 32

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 30, 31

Baptiste v. J.C. Penney Co.,
147 F.3d 1252 (10th Cir. 1998) 9

Beauchamp v. City of Noblesville, Ind.,
320 F.3d 733 (7th Cir. 2003) 8

BeVier v. Hucal,
806 F.2d 123 (7th Cir. 1986) 29

Bigford v. Taylor,
834 F.2d 1213 (5th Cir. 1988) 9

Brosseau v. Haugen,
543 U.S. 194 (2004) 27

Criss v. Kent,
867 F.2d 259 (6th Cir. 1988) 13

Culp v. United States,
486 A.2d 1174 (D.C. 1985) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Finigan v. Marshall,
574 F.3d 57 (2d Cir. 2009) 12, 13

Florida v. Harris,
133 S. Ct. 1050 (2013) 24

Garcia v. Does,
779 F.3d 84 (2d Cir. 2014) 9

Gasho v. United States,
39 F.3d 1420 (9th Cir. 1994) 29

Griffin v. Sirva Inc.,
No. 15-1307, --- F.3d ---, 2016 WL
4524466 (2d Cir. Aug. 30, 2016) 20

Groh v. Ramirez,
540 U.S. 551 (2004) 35

Henry v. United States,
361 U.S. 98 (1959) 8

Hope v. Pelzer,
536 U.S. 730 (2002) 27

Hunter v. Bryant,
502 U.S. 224 (1991) 7

Illinois v. Gates,
462 U.S. 213 (1983) 8, 19

Kozlovska v. United States,
30 A.3d 799 (D.C. 2011) 33

TABLE OF AUTHORITIES
(continued)

Page(s)

Logsdon v. Hains,
492 F.3d 334 (6th Cir. 2007) 9

Marks v. Carmody,
234 F.3d 1006 (7th Cir. 2000) 13

Maryland v. Pringle,
540 U.S. 366 (2003) 7, 8

McGloin v. United States,
232 A.2d 90 (D.C. 1967) 32

Nichols v. Woodward & Lothrop, Inc.,
322 A.2d 283 (D.C. 1974) 14

Ohio v. Robinette,
519 U.S. 33 (1996) 15

Ortberg v. United States,
81 A.3d 303 (D.C. 2013) 17, 29, 31, 32

Paff v. Kaltenbach,
204 F.3d 425 (3d Cir. 2000) 17

Pearson v. Callahan,
555 U.S. 223 (2009) 27

Prieto v. May Dep't Stores Co.,
216 A.2d 577 (D.C. 1966) 14

Ramirez v. City of Buena Park,
560 F.3d 1012 (9th Cir. 2009) 9, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Reichle v. Howards,
132 S. Ct. 2088 (2012) 27

Royster v. Nichols,
698 F.3d 681 (8th Cir. 2012) 14

Safford Unified Sch. Dist. No. 1 v. Redding,
557 U.S. 364 (2009) 31

Sennett v. United States,
667 F.3d 531 (4th Cir. 2012) 14

Smith v. United States,
281 A.2d 438 (D.C. 1971) 29

State v. Newcomb,
20 A.3d 881 (N.H. 2011) 13

Tillman v. Wash. Metro. Area Transit Auth.,
695 A.2d 94 (D.C. 1997) 14

Tolan v. Cotton,
134 S. Ct. 1861 (2014) 31

United States v. Christian,
187 F.3d 663 (D.C. Cir. 1999) 17, 28, 31

United States v. Joseph,
730 F.3d 336 (3d Cir. 2013) 8

United States v. Lanier,
520 U.S. 259 (1997) 31

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Navedo,
694 F.3d 463 (3d Cir. 2012) 24

United States v. Pack,
612 F.3d 341 (5th Cir. 2010) 22

Williams v. City of Alexander, Ark.,
772 F.3d 1307 (8th Cir. 2014) 8

Wilson v. Layne,
526 U.S. 603 (1999) 27, 31

Wright v. City of Philadelphia,
409 F.3d 595 (3d Cir. 2005) 13

STATUTES & CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 4

D.C. Code § 22-3302 17

D.C. Code § 22-3302 (2008) 17

U.S. Const. amend. IV 7, 18

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (10th ed. 2014) 19, 20

S. Ct. R. 10 ..... 15, 25

INTRODUCTION

This case presents the question whether officers lack probable cause to arrest under District of Columbia law for unlawful entry—a crime that requires that an individual knew, or should have known, that he was on the premises against the will of the lawful occupant—when the arrestees uniformly state they were invited by a specific individual who confirms to the officers that she invited them, but the police discover that she did not in fact possess lawful authority to extend the invitation.

The district court and the court of appeals held that Petitioners lacked probable cause to arrest Respondents because there was no evidence Respondents knew, or should have known, that their invitation was deficient. The district court and court of appeals further held that Petitioners were not entitled to qualified immunity because it was objectively unreasonable under clearly established law to arrest Respondents for unlawful entry in the absence of any evidence of wrongful intent. Nothing in Petitioners' petition for certiorari calls the correctness of the courts below into question, let alone warrants this Court's extraordinary review.

Petitioners claim the court of appeals created a conflict with other jurisdictions by applying a "heightened probable cause standard" that supposedly requires police officers to credit claims of an innocent mental state whenever made by suspects. Pet. 11-22. This overblown claim does not stand up to scrutiny. The court of appeals simply applied the familiar totality-of-the-circumstances test established by this Court and consistently applied by lower

courts. While Petitioners attempt to show a division of authority among jurisdictions, the cases they cite all involve other courts applying the *same* test to different facts. Petitioners' disagreement with the court of appeals' decision is in reality over how it applied this well-worn test to the facts of this case. The court of appeals' factual analysis is correct. But in any event, this factbound controversy does not merit this Court's review.

Similarly, the court of appeals applied the proper analysis to determine whether Petitioners are entitled to qualified immunity. Focusing its inquiry at a granular level of specificity, the court of appeals found it well-established that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense, including any state-of-mind element. Applying that standard, the court of appeals' conclusion that Petitioners are not entitled to qualified immunity is correct. In arguing to the contrary, Petitioners seek to relitigate the facts of this case rather than raise any substantial legal issue that merits this Court's attention.

The petition for certiorari should be denied.

STATEMENT

A. Factual Background.

In the early morning hours of Saturday, March 15, 2008, Respondents attended a party at a home in Northeast Washington, D.C. Pet. App. 47a. Officers from the D.C. Metropolitan Police Department (MPD) arrived at the house at approximately 1:30 a.m. in response to a call about the property. *Id.* After entering the residence, officers observed several

women who were "scantily dressed and had currency tucked into their garments." *Id.* at 48a. The home had folding chairs, a mattress, and working electricity and plumbing. *Id.* at 4a, 49a, 53a. One officer reported smelling marijuana, "but did not find any illegal narcotics and observed no illegal activity." *Id.* at 53a, 57a. Other officers similarly testified that they did not observe any illegal conduct. *Id.* at 57a, 58a, 60a.

Several Respondents told the officers "that a woman named 'Peaches' had invited [them] to the house for a bachelor party." *Id.* at 48a. Peaches was not at the home, but when reached by phone, told officers that she had just left the house and given Respondents permission to hold the bachelor party. *Id.* at 48a, 54a.

Peaches told officers that she had permission to occupy the property from the deceased property owner's grandson, Damion Hughes. Pet. App. 54a & n.7. Petitioner Andre Parker then spoke with Hughes, who stated that "he and Peaches were in the process of working out a leasing arrangement, but they never reached an agreement." *Id.* Based on that information, a sergeant on the scene directed Petitioners Parker and Anthony Campanale to arrest Respondents for unlawful entry. *Id.*

The MPD sergeant did not consider Respondents' subjective intent in ordering the arrests, erroneously believing that probable cause existed so long as Respondents, as an objective legal matter, lacked the right to be in the house. Pet. App. 51a, 56a-57a.

At the police station, the supervising lieutenant, upon consultation with upper level officers, disagreed

with the decision to arrest Respondents for unlawful entry and ordered their release. Pet. App. 51a-52a. However, after consulting with a representative of the District of Columbia Office of the Attorney General, the supervising lieutenant ordered that Respondents be charged with disorderly conduct. *Id.* at 52a. The disorderly conduct charge was made over the objection of the arresting sergeant, who complained that "there was no evidence [Respondents] had become loud or boisterous causing people to wake up, turn on their lights, and/or come outside to investigate a commotion." *Id.* The other officers at the scene likewise did not observe any activities consistent with a disorderly conduct charge. *Id.* at 49a.

The disorderly conduct charges were later dropped (*id.*), and this action followed.

B. District Court Proceedings.

Sixteen of the arrestees, Respondents here, sued five officers for false arrest under 42 U.S.C. § 1983, the officers and the District of Columbia for false arrest under common law, and the District of Columbia for negligent supervision, in the United States District Court for the District of Columbia. Pet. App. 6a. The parties filed cross-motions for partial summary judgment: Respondents moved for judgment on Petitioners' liability, whereas Petitioners moved for judgment based on qualified immunity. *Id.*

The district court granted Respondents' motion in part and denied Petitioners' motion in part. The district court concluded that "the officers did not have probable cause to support the unlawful entry arrest,"

and that "the arrests for disorderly conduct were made without probable cause." Pet. App. 66a-67a. The district court further concluded that Petitioners Parker and Campanale "failed to show, by undisputed facts, that it was objectively reasonable for these officers to rely on the information communicated by others at the scene to support the arrests." *Id.* at 78a. Accordingly, the district court concluded that those officers were "not entitled to qualified immunity . . . and, furthermore, that [Respondents] are entitled to summary judgment with respect to these two officers." *Id.* at 79a.

The district court, however, denied Respondents' summary judgment motion as to the disorderly conduct false arrest claims, which became the only claim on which liability was not determined. Pet. App. 99a. Following entry of the district court's summary judgment order, Respondents waived that claim, and the case proceeded to a damages-only trial as to Respondents' remaining claims against Officers Campanale and Parker, and against the District itself for negligent supervision. *Id.* at 121a. A jury awarded Respondents $680,000, and Petitioners appealed both the verdict and the summary judgment order to the United States Court of Appeals for the District of Columbia. *Id.*

C. Court of Appeals Proceedings.

The court of appeals, Judges Pillard and Edwards, affirmed. The court held that "Peaches' invitation vitiates the necessary element of [Respondents'] intent to enter against the will of the lawful owner. A reasonably prudent officer aware that [Respondents] gathered pursuant to an invitation

from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully." Pet. App. 11a. The court of appeals also affirmed the district court's denial of qualified immunity, finding that "[t]he controlling case law in this jurisdiction . . . made perfectly clear at the time of the events in this case that probable cause required some evidence that [Respondents] knew or should have known that they were entering against the will of the lawful owner." *Id.* at 24a. Finally, the court of appeals affirmed the district court's award of summary judgment to Respondents on their common-law negligent supervision claim against the District itself. *Id.* at 30a. Judge Brown dissented from the majority opinion. *Id.* at 32a.

Petitioners then petitioned for rehearing en banc, which the court of appeals denied. Pet. App. 104a. Judges Pillard and Edwards filed an opinion concurring in that denial, and Judge Kavanaugh, joined by Judges Henderson, Brown, and Griffith, filed an opinion dissenting from the denial of rehearing en banc. *Id.* at 105a, 116a. The dissent argued that the panel majority erred because the officers could reasonably have disbelieved Respondents' explanation "that they thought they had permission to use the house." *Id.* at 125a. In response, the concurrence expressed agreement "with virtually everything the dissent says about the law. Our disagreement is about the facts." *Id.* at 105a.

REASONS FOR DENYING THE PETITION

I. PETITIONERS ASK THIS COURT TO ENGAGE IN MERE ERROR CORRECTION OF THE COURT OF APPEALS' FACTBOUND PROBABLE CAUSE DETERMINATION.

A. The Court of Appeals Applied the Correct Probable Cause Standard.

In determining that the officers lacked probable cause to arrest Respondents for unlawful entry, the court of appeals, like the district court before it, applied the well-established totality-of-the-circumstances test for probable cause. The petition misconstrues the D.C. Circuit's reasoning in an unpersuasive attempt to manufacture a circuit split—but none of the cases relied upon by Petitioners applied a different legal standard. Rather, they all applied the familiar probable cause standard to different facts.

1. Under this Court's well-established Fourth Amendment jurisprudence, probable cause to arrest exists if "at the moment the arrest was made[,] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that" the suspects committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). This standard "depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citations omitted). The touchstone of any probable cause analysis is whether there exists "a reasonable ground for belief of guilt." *Id.* (quoting

Brinegar v. United States, 338 U.S. 160, 175 (1949)). "[T]he belief of guilt must be particularized with respect to the person to be searched or seized." *Id.* (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). "[C]ommon rumor or report, suspicion, or even 'strong reason to suspect' [are] not adequate to support" an arrest. *Henry v. United States*, 361 U.S. 98, 101 (1959).

The evidence necessary to support a finding of probable cause is less than what would be necessary to support a conviction. *See Illinois v. Gates*, 462 U.S. 213, 235 (1983). At the same time, however, because the evidence available to the arresting officers must support the conclusion that the suspect committed a crime, probable cause does not exist where there is no evidence establishing one of the elements of the offense. *See Williams v. City of Alexander, Ark.*, 772 F.3d 1307, 1312 (8th Cir. 2014) ("For probable cause to exist, there must be probable cause for all elements of the crime."); *United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013) ("To make an arrest based on probable cause, the arresting officer must have probable cause for each element of the offense."); *Beauchamp v. City of Noblesville, Ind.*, 320 F.3d 733, 745-46 (7th Cir. 2003) (probable cause to arrest exists "[o]nce an officer has established probable cause on every element of a crime").

Importantly, the totality-of-the-circumstances test requires that "the whole picture" be taken into account. *Alabama v. White*, 496 U.S. 325, 330 (1990) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). As the courts of appeals have consistently recognized, this means that facts showing that behavior is innocent must be considered and may

negate facts that, in isolation, would otherwise suggest guilt. Officers cannot "simply turn a blind eye toward potentially exculpatory evidence." *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir. 2007) (citations omitted); *see also Garcia v. Does*, 779 F.3d 84, 93 (2d Cir. 2014) ("[P]robable cause may be defeated if the officer deliberately disregards facts *known to him* which establish justification") (citation omitted) (emphasis in original); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1023-24 (9th Cir. 2009) ("As a corollary of the rule that the police may rely on the totality of facts available to them in establishing probable cause, *they also may not disregard facts tending to dissipate probable cause.*") (emphasis added) (alteration omitted) (quoting *United States v. Lopez*, 482 F.3d 1067, 1073 (9th Cir. 2007)); *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988) (same); *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998) ("While officers may weigh the credibility of witnesses in making a probable cause determination, *they may not ignore available and undisputed facts.*") (emphasis added).

2. The D.C. Circuit faithfully applied this familiar probable cause standard. The court began by noting that "[a]n arrest is supported by probable cause if, 'at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing' that the suspect has committed or is committing a crime." Pet. App. 8a (quoting *Beck*, 379 U.S. at 91). The court noted that it must "'giv[e] due weight to the inferences drawn by the officers." *Id.* (quoting *Ornelas v. United States*,

517 U.S. 690, 697, 699 (1996)). And it noted that while "[p]robable cause 'does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction[,]' . . . the police cannot establish probable cause without at least *some* evidence supporting the elements of a particular offense, including the requisite mental state." *Id.* at 9a-10a (quoting *Adams v. Williams*, 407 U.S. 143, 149 (1972)).

In keeping with these principles, the court of appeals recognized that under D.C. law, officers who make an arrest for unlawful entry "must have reasonable grounds to believe" that the suspects knew or should have known that they entered against the owner's express will. Pet. App. 10a (quoting *Carr v. District of Columbia*, 587 F.3d 401, 410-11 (D.C. Cir. 2009)). The court therefore examined "whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that Plaintiffs knew or should have known that they had entered the house 'against the will of the lawful occupant or of the person lawfully in charge thereof,' and intended to act in the face of that knowledge." *Id.* at 9a (quoting D.C. Code § 22-3302). In holding that a reasonable officer could not have so concluded, the court observed that: (1) Respondents uniformly stated that they had been invited to a party at the house; (2) the officers had uncontroverted statements from both Peaches and another attendee that Peaches told Respondents they could be there; and (3) the owner of the home was negotiating a lease with Peaches. *Id.* at 10a. In short, "[a] reasonably prudent officer aware that [Respondents] gathered pursuant to an

invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully." *Id.* at 11a.

Nothing about the court of appeals' analysis departed from the well-worn totality-of-the-circumstances test established by this Court and applied over decades by lower courts. Petitioners claim the court of appeals created a "heightened" probable cause requirement by ruling that officers *must* accept a suspect's claim of an innocent state of mind even when there is reason to doubt the credibility of the claim. Pet. 11. But the court of appeals expressly *rejected* that rule, holding that "if the facts of which officers are aware and the reasonable inferences that arise from those facts cast doubt on a suspect's story, officers need not credit the suspect." Pet. App. 105a. The court simply found that on the facts of this case, all of the evidence available to the arresting officers indicated that Respondents had "gathered pursuant to an invitation from someone with apparent (if illusory) authority" and therefore did not possess the requisite mental state for unlawful entry under District of Columbia law. *Id.* at 6a. This is entirely consistent with this Court's totality-of-the-circumstances test and the requirement that a suspect cannot be arrested if there is insufficient evidence supporting an element of the offense.

3. Petitioners attempt to manufacture a division of authority by citing a number of supposedly analogous cases where other courts have found that probable cause for arrest existed despite a suspect's innocent explanation for his or her conduct. All of the cases upon which Petitioners rely, however, involved

application of the same probable cause standard to distinguishable facts. Specifically, Petitioners' cited cases all involved suspects whose credibility was undermined by significant circumstantial evidence of guilt and who lacked corroborating evidence supporting their proffered innocent explanation. *None* of Petitioners' cited cases involve circumstances similar to those presented here, where the suspects' consistent statements negating the requisite mens rea were independently corroborated at the scene. Petitioners' cases merely demonstrate that probable cause determinations—in keeping with the totality-of-the-circumstances test—turn on the particular facts of each case.

For example, in *Finigan v. Marshall*, 574 F.3d 57 (2d Cir. 2009), the suspect was arrested after using a locksmith to access her former home. *Id.* at 59. The suspect entered the home without her separated husband's consent or knowledge, but told authorities that "her divorce attorney told her she could do so." *Id.* at 60. Given the suspect's surreptitious entry into the house, that a report of burglary at the address had been made, that the husband had changed the locks, and that New York law prohibits a titled spouse from entering a residence without the resident spouse's permission, the Second Circuit reasonably concluded the officer had valid grounds for believing the suspect had committed a crime. *See id.* at 62-63 ("[U]nder New York law, a non-resident spouse who is a titled owner of a house and enters without the permission of the resident spouse may be convicted of burglarizing his or her own property.") (citations omitted).

In *Wright v. City of Philadelphia*, 409 F.3d 595 (3d Cir. 2005), the Third Circuit found probable cause for police to arrest a suspect who broke a window to enter a house even though the suspect claimed she entered the residence to "retrieve her clothes and evidence of" a sexual assault. *Id.* at 603. There, however, the police were entitled to disbelieve the suspect's explanation because the retrieved items "were unlikely to help the police identify her attackers," and because she turned over the evidence "only after her mother alerted the police as to her possession of them." *Id.* Accordingly, the police officers' belief "was not unreasonable in light of the information the officers possessed at the time." *Id.* *Wright* thus differs from the present situation in that there were facts on the ground contravening the suspect's proffered explanation, and like *Finigan*, there was no independent corroboration of the suspect's intent.

Petitioners' remaining cases are all of a piece. Each contains similar distinctions—either the officers knew facts at the time of the arrest that contravened the suspect's proffered intent, or there was a lack of corroborating evidence of such intent, or both. *See State v. Newcomb*, 20 A.3d 881 (N.H. 2011) (suspect's innocent explanation for unlawful trespass was not supported by corroborating evidence, and explanation belied by nervous appearance and by actions inconsistent with innocent intent); *Criss v. Kent*, 867 F.2d 259 (6th Cir. 1988) (suspect's innocent explanation for receipt of stolen street sign was not supported by corroborating evidence and belied by the nature of the property); *Marks v. Carmody*, 234 F.3d 1006 (7th Cir. 2000) (suspect's proffered

explanation for why he wrote a bad check was not supported by any other evidence); *Royster v. Nichols*, 698 F.3d 681 (8th Cir. 2012) (officer entitled to disregard suspect's stated reason for refusing payment where other witnesses disputed the explanation); *Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (photojournalist's innocent explanation for why she was at the scene of a criminal protest was both belied by other facts and not corroborated by other evidence); *Ramirez*, 560 F.3d at 1023-24 (police entitled to disregard suspect's innocent explanation where other facts, such as suspect's pulse rate and failures on sobriety field tests, belied explanation).

Nor, contrary to Petitioners' claims, is there any conflict between the rule applied by the D.C. Circuit and the rule applied by the District of Columbia Court of Appeals. *See* Pet. 16. Petitioners' cited cases all apply the same probable cause standard to distinguishable facts—specifically, to circumstances in which the suspects' innocent explanations were uncorroborated or unknown to the police at the time of the arrest. *See Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 96 (D.C. 1997) (although alleged fare-skipper offered an innocent explanation, it was uncorroborated and he became agitated when confronted by police); *Nichols v. Woodward & Lothrop, Inc.*, 322 A.2d 283, 285 n.2, 286 n.6 (D.C. 1974) (arresting officer did not know, at the time of the arrest, of the evidence corroborating the suspect's explanation); *Prieto v. May Dep't Stores Co.*, 216 A.2d 577, 578 (D.C. 1966) (alleged shoplifter's explanation that she had "forgotten" that she had the stolen merchandise was uncorroborated).

In sum, the petition does not identify precedent from any other court "in conflict" with the decision below "on the same important matter." S. Ct. R. 10(a). Like the dissenting opinion below, Petitioners merely disagree with the panel majority over whether the officers were presented with sufficient circumstantial evidence to overcome Respondents' proffered explanation for their presence and the evidence corroborating it. As the majority put it, "[o]ur disagreement ... comes down to our case-specific assessment of the circumstantial evidence in the record." Pet. App. 113a; *see also id.* at 105a ("The panel agrees with virtually everything the dissent says about the law. Our disagreement is about the facts."). Nothing in the petition for certiorari warrants this Court's review of that fact-bound determination.

4. If anything, it is Petitioners who seek to distort the probable cause standard. They effectively argue for a rule that arresting officers are permitted to ignore exculpatory evidence that is known to them. Under Petitioners' view, officers should always be able to claim that their "experience" and "judgment" establishes that a suspect who proffers an innocent explanation is lying so that probable cause for arrest exists—even where the innocent explanation is corroborated by the available evidence and no contrary evidence exists. Pet. 23-24. But that is inconsistent with the approach to probable cause established by this Court.

"In applying [the probable cause] test, [this Court] ha[s] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S.

33, 39 (1996). Just as it would have been improper for the court of appeals to hold—which it did not—that suspects' innocent explanations must always be *believed*, it would be improper to hold that police may always *discredit* suspects' innocent explanations even when those explanations are corroborated by other available evidence. Such an approach would not only establish a bright-line rule, contrary to this Court's precedents, it would give police license to arrest citizens engaged in innocent conduct and then justify the arrest after the fact through the bare assertion that they found the suspect not to be "credible."

B. The Court of Appeals' Determination That There Was No Probable Cause Was Correct; In Any Event, Petitioners Do No More Than Challenge the Application of Settled Law to the Facts of This Case.

Lacking any genuine discrepancy between the court of appeals' decision in this case and precedent from other circuits, Petitioners urge the Court to reverse the D.C. Circuit because they had probable cause to arrest under the facts. Pet. 17-22. Even putting aside the fact that this Court does not generally expend its resources to engage in error correction, the court of appeals correctly determined that Petitioners did not possess the necessary probable cause to arrest Respondents for unlawful entry.

At the time of the arrest, D.C. law made it a misdemeanor for a person "without lawful authority" to "enter, or attempt to enter, any public or private dwelling, building, or other property . . . against the will of the lawful occupant or of the person lawfully

in charge thereof." D.C. Code § 22-3302 (2008).[1] To establish a violation of the statute, the government must prove that "(1) the accused entered or attempted to enter public or private premises or property; (2) he did so without lawful authority; (3) he did so against the express will of the lawful occupant or owner; and (4) general intent to enter." *Culp v. United States*, 486 A.2d 1174, 1176 (D.C. 1985). To satisfy the requisite mental state, the government must prove "that a defendant knew or should have known that his entry was unwanted." *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013).

The court of appeals recognized that the quantum of proof needed to sustain probable cause is less than to succeed at trial, but correctly held that "the police cannot establish probable cause without at least *some* evidence supporting the elements of a particular offense, including the requisite mental state." Pet. App. 9a-10a; *see United States v. Christian*, 187 F.3d 663, 667 (D.C. Cir. 1999) (holding that officers lacked probable cause to arrest suspect for possessing dagger with intent to use unlawfully "[g]iven the possibility of a lawful purpose, and the absence of any evidence whatsoever that [the suspect] possessed the knife for an unlawful one"); *cf. Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000) (to have probable cause on mens rea element of trespass offense, officer must obtain "information supporting a conclusion that the potential defendant in a trespass case was

---

[1] D.C.'s unlawful entry statute has since been amended. *See* D.C. Code § 22-3302. The court of appeals considered the previous version of the statute in conducting its analysis. Pet. App. 9a n.3.

not licensed or privileged and that he was so advised by the custodian of the property").

Petitioners lacked any evidence that Respondents intended to enter the house without lawful authority. Respondents uniformly stated that Peaches had invited them to a party at the house, and Peaches confirmed that understanding. Based on these facts, "[m]ultiple officers on the scene testified that they did not observe anything leading them to believe that [Respondents] had any reason to think they lacked the right to be in the house." Pet. App. 12a n.4. This was not a situation where the suspects provided conflicting accounts, or where there was any indication that Respondents made up their explanations; rather, it was a situation where arresting officers refused to consider corroborated, exculpatory evidence because they believed (erroneously) that intent is not an element of the crime.

In the courts below, Petitioners argued that Respondents' Fourth Amendment claim failed because social guests cannot challenge constitutional violations relating to seizures of their persons (Pet. App, 75a), because Petitioners were entitled to arrest on a showing less than probable cause (*id.* at 75a n.14), and because Respondents' bona fide belief that they had permission to enter the house is relevant only as a defense to a criminal prosecution (Pet. App. 10a-11a). Abandoning those meritless arguments, Petitioners now seek reversal on the sole ground that a reasonable officer could have disbelieved Respondents (even if Petitioners did not do so here).

Petitioners' factual arguments fail. Although innocent activity may form the basis of a probable cause finding, the requisite "degree of suspicion" to do so is missing in the present case. *Gates*, 462 U.S. at 243 n.13. Thus, Petitioners point to several facts that purportedly "discredited" Respondents' claim of a bona fide invitation. Pet. 17-18. Yet none of the evidence on which Petitioners rely indicates that Respondents entered the house against the will of the lawful owner.

First, Petitioners contend Respondents "were in a vacant home late at night." Pet. 17. Under D.C. law, however, the presence of a person in a vacant dwelling is not *prima facie* evidence that entry into the building was against the will of the owner unless the property is "boarded up or otherwise secured in a manner that conveys that it is vacant and not to be entered." Pet. App. 65a (quoting D.C. Code § 22-3302(a)(1) (2007)). In any event, the district court reasonably concluded that the house was not "vacant," *i.e.*, "completely empty." *Vacant*, BLACK'S LAW DICTIONARY (10th ed. 2014). "[I]t is undisputed that the electricity was working, the property contained a mattress, candles, chairs, food, and the bathrooms were functional." Pet. App. 65a; *see also id.* at 16a ("[T]here is nothing in the record suggesting that the condition of the house . . . should have alerted [Respondents] that they were unwelcome").

Second, Petitioners contend Respondents were engaged in "illicit behavior." Pet. 17. Because the officers uniformly testified that they did not observe illegal activity (Pet. App. 15a), Petitioners must mean

"illicit" in its alternative sense of "improper."[2] *Illicit*, BLACK'S LAW DICTIONARY (10th ed. 2014). But regardless of whether Petitioners' moral sensibilities are offended by the presence of "scantily dressed" women, the officers' observations provided no reason to doubt Respondents' explanation of lawful entry. Certainly, common sense does not suggest, and Petitioners proffered no evidence establishing, that trespassers are more likely to attend parties involving exotic dancing than non-trespassers.

Third, Petitioners suggest Respondents could be disbelieved because an unidentified number of partygoers told officers they were present for a birthday party whereas others claimed it was a bachelor party (as Peaches reported). Pet. 17; *see* Joint App'x 372. As an initial matter, the testimony upon which Petitioners rely was introduced at the trial on damages—*after* the district court decided Respondents' summary judgment motion—and therefore cannot be relied upon to cast doubt on the district court's liability determination. *See, e.g.*, *Griffin v. Sirva Inc.*, No. 15-1307, --- F.3d ---, 2016 WL 4524466, at *3 (2d Cir. Aug. 30, 2016) (collecting cases holding that district court's grant of summary judgment must be examined independently of evidence presented at trial). There was no evidence in the summary judgment record that any of the partygoers told police they were present for a birthday party:

- Respondents uniformly testified that they were at the home for a bachelor party. *See*

[2] Officers testified that they neither found illegal drugs in the home, nor observed any drug-related activity. Pet. App. 4a n.1.

Hunt Dep., Dist. Ct. Doc. No. 25-2, at 3 (Jan. 11, 2011) ("We went there to do a bachelor party."); Chittams Dep., Dist. Ct. Doc. No. 31-10, at 3 (Apr. 1, 2011) ("Tasty said she knew a guy that was having a bachelor party."); Taylor Dep., Dist. Ct. Doc. No. 31-14, at 3 (Apr. 1, 2011) ("A bachelor's party, yes, sir."); Cole Dep., Dist. Ct. Doc. No. 31-15, at 3 (Apr. 1, 2011) ("I was going to a bachelor party.").

- The arresting sergeant testified that Peaches said "she gave the people who were inside the place, told them they could have the bachelor party." Suber Dep., Dist. Ct. Doc. No. 33-3, at 4 (Apr. 18, 2011).
- The arrest report contained no mention of conflicting statements. Arrest Rep., Dist. Ct. Doc. No. 31-4 (Apr. 1, 2011).
- Multiple officers, including the officer who testified during the trial about the conflicting statements, did not mention any conflicting statements during their depositions or in their interrogatory responses when asked to justify their arrests of Respondents. *See* Campanale Interrog., Dist. Ct. Doc. No. 31-19 (Apr. 1, 2011); Campanale Dep., Dist. Ct. Doc. No. 31-16, at 4 (Apr. 1, 2011) ("Q: And what was your basis for arresting somebody for unlawful entry? A: That they did not have permission to be inside the residence."); Newman Dep., Dist. Ct. Doc. No. 33-7, at 6 (Apr. 18, 2011) ("The facts that led me to

believe that [there was probable cause] was [sic] that no one knew who the owner was.").

- Petitioners never presented their conflicting-statements theory in either their summary judgment briefing, *see* Defs.' Opp'n to Pls.' Mot. for Summ. J., Dist. Ct. Doc. No. 30, (Apr. 1, 2011); Defs.' Mem. in Supp. of Mot. for Summ. J., Dist. Ct. Doc. No. 31-1 (Apr. 1, 2011); Defs.' Reply in Supp. of Mot. for Summ. J., Dist. Ct. Doc. No. 36 (May 12, 2011), or in their statements of fact, *see* Defs.' Opp'n to Pls.' Stmt. of Facts, Dist. Ct. Doc. No. 30-1 (Apr. 1, 2011); Defs.' Stmt. of Facts, Dist. Ct. Doc. No. 31-2 (Apr. 1, 2011).

In any event, this evidence does not present grounds to disbelieve the partygoers' consistent statements that they were invitees. Given that some partygoers were invited by Peaches directly and others by another guest (Pet. App. 4a), it is hardly surprising the twenty-one suspects failed to give a uniform answer. Critically, nothing Respondents told the officers gave any reason to doubt they believed their invitation to attend a party—of whatever sort—was extended by an individual without lawful authority. The inconsistency identified by Petitioners is "simply too minor and insignificant to give rise to any reasonable suspicion of any criminal activity." *United States v. Pack*, 612 F.3d 341, 360 (5th Cir. 2010).

Fourth, Petitioners claim that because "Peaches" was evasive when officers reached her by phone, the officers could have inferred that she invited

Respondents "in a manner that alerted or suggested that she was without actual authority to do so." Pet. 18. Petitioners' argument, however, is wholly divorced from the facts of the case, as testified to by the arresting officers. When the officers spoke to Peaches on the phone and asked whether she had permission to use the house, she had every reason to disclaim having authorized the party. She was absent from the scene, after all, and implicated only because the partygoers had stated she invited them. Instead, she *confirmed* to the officers "that she gave the people who were inside the place, told them they could have the bachelor party." Pet. App. 50a (quoting testimony of Sergeant Andre Suber). Only when the officers pressed Peaches on the lawfulness of her *own use* of the house did she "bec[o]me evasive and h[a]ng up the phone." *Id.* "[T]here is simply no evidence in the record that [Respondents] had any reason to think the invitation was invalid." *Id.* at 12a. Indeed, Petitioners did not even ask Peaches or the house's owner whether Respondents knew Peaches had no right to be in the house. *Id.* at 12a n.4. Probable cause to arrest cannot be predicated on "[t]he bare, unsupported possibility" that Respondents were invited to use the house in a manner that alerted them to Peaches' lack of authority in the absence of any facts suggesting that to be the case. *Id.* at 112a.

Finally, Petitioners state that probable cause existed because the partygoers "scattered and hid when uniformed officers" entered the home. Pet. 17. The evidence is that when an individual opened the door, one officer "could see people in the house scattering into different rooms." Joint App'x 150.

Even headlong flight, however, though it "may be 'suggestive' of wrongdoing, . . . is not sufficient standing alone to create probable cause." Pet. App. 16a (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)); *see also United States v. Navedo*, 694 F.3d 463, 474 (3d Cir. 2012) ("unprovoked flight, without more, can not [sic] elevate reasonable suspicion to detain and investigate into the probable cause required for an arrest"). That a group of partygoers engaged in observing semi-nude dancing in a house in Northeast D.C. at 1:30 a.m. left the room rather than talk to the police is hardly surprising. Many citizens do not have confidence that even routine interactions with the police will end well. If "headlong flight" from police, without more, does not establish probable cause for an arrest, the "scattering" of a group of partygoers under these circumstances does not establish that they were at the house unlawfully. And because none of the other facts highlighted by Petitioners gave the officers reason to doubt Respondents' state of mind, Petitioners are not aided by the principle that probable cause is a "totality of the circumstances" test. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013).

That leaves Petitioners to rely on their post-hoc claim that a reasonable officer could have concluded—on the basis of nothing more than hypothesized indicia of untruthfulness not testified to by any of the officers present at the scene—that Respondents' statements were not credible. In rejecting this argument, the court of appeals did not, contrary to Petitioners' claim, require "direct, affirmative proof" that Respondents had the requisite mens rea. Pet. 19. On the contrary, the court of

appeals expressly allowed that "circumstantial evidence may 'make it reasonable to infer' that a suspect has a culpable state of mind." Pet. App. 106a; *see also id.* at 14a. But the court of appeals *did* quite properly require *some* circumstantial evidence grounding such an inference. And as the record establishes, "nothing about what the police learned at the scene"—circumstantial or otherwise—"suggest[ed] that [Respondents] 'knew or should have known that [they were] entering against the [owner's] will.'" *Id.* at 64a.

C. The Petition Does Not Present a Question of Nationwide Importance.

At root, the petition for certiorari asks this Court to review the D.C. Circuit's application of well-settled law to the particular facts of this case. But this Court does not normally engage in error correction. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Petitioners and their *amici* claim that this Court's intervention is necessary to avoid chilling police activities. Pet. 23-24; States' Amicus Br. 6-9. But these claims are overblown. This case does not involve, as Petitioners urge, the question whether police officers must credit a suspect's naked excuse for unlawful conduct. *See* Pet. 23 ("The drugs in my locker aren't mine.") (quoting Pet. App. 126a); *see also* States' Amicus Br. 11. As the court of appeals explained, nothing about its decision requires officers "to accept suspects' implausible protestations of innocence and ignore other, circumstantial evidence

of culpability." Pet. App. 105a. Rather, the opinion below merely addresses whether officers have probable cause to arrest for unlawful entry under D.C. law—an offense with a well-established mens rea requirement—when the suspects' statements that they believed they entered lawfully are fully corroborated by facts known to the arresting officers.

Moreover, a case such as this one—where individuals provide a corroborated claim to have authorization for an action, and the authorization renders their conduct innocent, but the ultimate basis for the authorization proves flawed for reasons of which they are unaware—is unlikely to recur often in the future, making review by this Court unnecessary.

II. THE COURT OF APPEALS APPLIED THE CORRECT QUALIFIED IMMUNITY ANALYSIS, AND ITS DENIAL OF QUALIFIED IMMUNITY WAS CORRECT.

The court of appeals held that Respondents are not entitled to qualified immunity because it is well established that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense, including any state-of-mind element. The court of appeals' holding was both formulated at an appropriate level of specificity and correct on the facts. Petitioners attempt to manufacture uncertainty by relying on a series of factually distinguishable cases. Reduced to its essence, Petitioners' argument is that the court of appeals misinterpreted the facts of this case. That argument does not justify a grant of certiorari.

A. The doctrine of qualified immunity shields officials from civil liability only if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (alteration omitted). Whether the violative nature of particular conduct is clearly established must be assessed "in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citation omitted). At the same time, this Court has rejected the idea that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Instead, what is required is that "in the light of pre-existing law[,] the unlawfulness must be apparent." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). The crux of the qualified immunity test is whether officers have "fair notice" that they are acting unconstitutionally. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

The court of appeals' qualified immunity analysis conforms to this Court's precedents. Recognizing that "[i]t is not enough to reiterate that the Fourth Amendment's restrictions against arrest without probable cause are clearly established," the court focused its inquiry "at a finer level of specificity." Pet. App. 22a. The court of appeals stated the applicable

constitutional rule as follows: "The law in this jurisdiction has been well established for decades that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest, including any state-of-mind element." Pet. App. 23a. As the court of appeals explained, this rule is firmly established in decisions announced by the District of Columbia Court of Appeals, the Court of Appeals for the District of Columbia Circuit, and by courts of appeals for other circuits.

First, the D.C. Circuit has clearly held that there must be some evidence of the suspect's mental state to arrest an individual when the crime of arrest contains a state-of-mind element. In *United States v. Christian*, the D.C. Circuit held that officers lacked probable cause to arrest an individual for possessing a dagger with the intent for unlawful use in the absence of creditable evidence of the suspect's intent. 187 F.3d at 667. The *Christian* court found that the circumstances of the dagger's supposed lack of utilitarian purpose and the suspect's presence in a high-crime neighborhood were insufficient to ground an inference that the suspect possessed the requisite mens rea. These circumstances, the court found, did not negate the obvious lawful use of the dagger—self-defense. "[T]he officers did not simply lack the 'type of specific evidence of' [the suspect's] intent 'as would be needed to support conviction,'" the D.C. Circuit held, "they lacked any evidence at all that [the suspect] intended to use the dagger unlawfully. Without such evidence, there was no probable cause for arrest." *Id.* (quoting *Adams*, 407 U.S. at 149).

This decision squares with decisions from other courts of appeals finding that officers need evidence of the suspect's mental state to have probable cause to arrest for a crime with a mens rea requirement. *See, e.g.*, *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) ("[W]hen specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred."); *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986) (holding that to have probable cause under a statute requiring knowing or willful conduct, officers "needed some evidence" to satisfy this element).

Second, there is no ambiguity in District of Columbia law that the crime of unlawful entry possesses a mens rea requirement. "[I]t has been long understood" in the District of Columbia that the crime of unlawful entry requires the government to prove the suspect intended to be on the property "contrary to the will of the lawful owner." *Ortberg*, 81 A.3d at 307. Accordingly, the government must prove "that a defendant knew or should have known that his entry was unwanted." *Id.* at 308. As the *Ortberg* court further recognized, it is well established that "a defendant 'lacks the requisite criminal intent for unlawful entry' 'when a person enters a place with a good purpose and a bona fide belief in his or her right to enter.'" *Id.* (quoting *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993)) (alterations omitted); *see also Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971) ("Where a person enters a place with a good purpose and with a bona fide belief of his right to enter, he lacks the element of criminal intent required ... and is not guilty of unlawful entry.").

As Petitioners "perform their functions in a single jurisdiction," they "'reasonably can anticipate when their conduct may give rise to liability for damages' and so are expected to adjust their behavior in accordance with local precedent." *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) (Kennedy, J., concurring) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). Accordingly, the court of appeals properly asked whether, under these precedents, "it was objectively reasonable" for the arresting officers "to conclude that there was probable cause to believe Plaintiffs were engaging in . . . unlawful entry." Pet. App. 21a. And the court determined, in light of the absence of facts indicating that Respondents knew that Peaches' invitation was not grounded in actual authority to invite them, that it was not.

B. Contrary to the claims of Petitioners and their *amici*, the court did not apply a rule formulated at an improperly high level of generality or a rule that was not clearly established.

First, Petitioners contend that even if it is clearly established that there must be some evidence of the suspect's mental state to arrest for a crime containing a state-of-mind element, "this is not the level of specificity this Court requires." Pet. 25. According to Petitioners, the proper question is whether probable cause to arrest exists when officers confront "persons behaving suspiciously inside a vacant home, late at night, where the lawful owner disclaims their right to be there, but the suspects claim that they were

invited by someone who is not present and is uncooperative and untruthful with police." *Id.* at 26.[3]

Petitioners frame the question far too narrowly. Although courts should not define "clearly established law at a high level of generality," *al-Kidd*, 563 U.S. at 742, it does not follow that police officers are entitled to qualified immunity whenever a novel factual situation arises, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009). Thus, this Court has rejected Petitioners' position that "the very action in question [have] previously been held unlawful." *Wilson*, 526 U.S. at 615. Given cases such as *Christian*, as well as the long-standing jurisprudence recognized by the District of Columbia Court of Appeals in *Ortberg*, Respondents had "fair and clear warning" that Respondents could not be arrested for unlawful entry in the face of their corroborated exculpatory statements absent evidence that Respondents knew or had reason to know their inviter was not a legal resident of the premises. *United States v. Lanier*, 520 U.S. 259, 271 (1997).

Second, Petitioners erect a straw man, arguing that the rule applied by the court of appeals is not clearly established because a number of circuit courts and state supreme courts, in addition to courts within the District of Columbia, have purportedly "held (and

---

[3] Petitioners' framing of the question relies on improper factual inferences. For purposes of qualified immunity, the facts must be viewed in the light most favorable to Respondents (the non-moving party on this issue). *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014). As explained above, the evidence in the record established that the home was not vacant. And Petitioners' contention that Respondents were "behaving suspiciously" is a conclusory statement unsupported by the evidence.

continue to hold) that probable cause exists to arrest for trespassing, even though the suspect asserted a good-faith claim of right." Pet. 26. The court of appeals, however, did not hold that officers may never arrest for unlawful entry when the suspect offers an innocent explanation. And none of Petitioners' cited cases conflicts with the court of appeals' actual holding that some evidence of mens rea is required to arrest for a crime that possesses a mental-state element.

As already explained, *none* of Petitioners' federal authorities address a good-faith claim of right where that good faith is corroborated by independent, uncontroverted evidence. *See supra* at Part I.A.3.

Petitioners' argument that the court of appeals' opinion runs contrary to established District of Columbia law is similarly unpersuasive. None of the cited cases involve a situation where the suspect's explanation for being in the premises was corroborated by independent evidence. In *McGloin v. United States*, 232 A.2d 90 (D.C. 1967), for example, the suspect's stated explanations—looking for a cat, or looking for a friend—were contradictory and lacked any corroboration. *Id.* at 90-91. Likewise, in *Ortberg*, 81 A.3d 303, the suspect's uncorroborated explanation—that he did not know the fundraiser was a private event—was belied by the presence of a registration table, and the suspect's attempts to stall his ejection. And in *Artisst v. United States*, 554 A.2d 327 (D.C. 1989), a prominently-posted warning obviated the suspect's innocent explanation; even if it were true that a resident had invited the suspect in, that invitation would not have justified entry in the

face of the warning requiring presentation of identification to a security guard.

The only other citation Petitioners provide in support of this argument is *Kozlovska v. United States*, 30 A.3d 799 (D.C. 2011), which, Petitioners say, upheld the "conviction of a woman previously barred from a building despite her unrebutted testimony that the superintendent permitted her to use the building." Pet. 27. The suspect's explanation, while *unrebutted*, was not *corroborated* by the superintendent who purportedly gave the defendant permission to enter. In fact, the lack of corroboration is part of the reason that the trial court found the suspect not credible. *Kozlovska*, 30 A.3d at 803. Here, Respondents' explanations were both unrebutted and corroborated.

Third, the claim of Petitioners' *amici* that the court of appeals created a new rule and retroactively applied it to the officers in this case is based on a blatant misreading of the opinion below. Relying primarily on citations to a concurrence in denial of rehearing en banc that does not embody the holding below, the States misconstrue the court of appeals' holding as turning on the subjective mental state of the arresting officers. States' Amicus Br. 14-21. But the court's holding does no such thing.

The court specifically rejected the argument that the officers' subjective assessment of the facts was relevant to the probable cause determination, stressing that "[a]s long as the arresting officers had an objectively valid ground upon which to make an arrest, . . . the subjective knowledge and intent of the officers is irrelevant." Pet. App. 18a. Instead, the

court held that the probable cause inquiry focuses on "whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that Plaintiffs knew or should have known that they had entered the house 'against the will of the lawful occupant or of the person lawfully in charge thereof,' and intended to act in the face of that knowledge." Pet. App. 9a. The court accordingly focused on whether the facts known to the officers indicated that Respondents entered the house without the express consent of someone they believed to be the lawful occupant. Pet. App. 12a.

At bottom, the States—like Petitioners—simply disagree with what the facts show. Indeed, the States concede that the court of appeals' assessment of the evidence "if true, would have eliminated probable cause for the arrest." States' Amicus Br. 15. But this Court does not ordinarily grant review to determine if disputed facts are "true" or not.

Fourth, because the court of appeals applied a well-established rule, Petitioners' assertion that affirming the district court will punish officers who lacked "fair warning" of an "obvious" constitutional principle is misguided. Pet. 28. As both the district court and the court of appeals noted, officers *at the scene of the investigation* admitted that the facts known to them at the time did not establish probable cause to effect an arrest. *See* Pet. App. 6a (explaining that both the commanding lieutenant and a representative from the District of Columbia's Attorney General's office agreed to change the charge from unlawful entry to disorderly conduct); *id.* at 12a n.4 ("Multiple officers on the scene testified that they did not observe anything leading them to believe that [Respondents]

had any reason to think they lacked the right to be in the house."); *see also id.* at 52a. Petitioners' argument that the lack of probable cause was not obvious falls flat in the face of their own agents' contrary testimony.

Finally, this Court should not reverse merely because four judges on the court of appeals found that probable cause existed, as Petitioners suggest. Pet. 28. Taken to its logical extreme, Petitioners' argument would require courts to afford qualified immunity to officers any time any jurist believed that a constitutional violation had not occurred. Petitioners' argument is unsupported by this Court's precedent. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 576 (2004) (denying qualified immunity even though three Justices believed that "despite the invalid warrant, the resulting search was reasonable and hence constitutional") (Thomas, J., dissenting). The dissenting judges below, like Petitioners here, merely disagree that the record supports probable cause. That factbound disagreement does not warrant this Court's review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TED J. WILLIAMS
(Counsel of Record)
LAW OFFICES OF GREGORY L. LATTIMER
1200 G Street, N.W.
Suite 800
Washington, DC 20005
Telephone: +1.202.434.4513
Facsimile: +1.866.764.6442
lattlaw@aol.com

Counsel for Respondents

September 16, 2016

No. 15-1485

Supreme Court, U.S.
FILED
OCT - 4 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

KARL A. RACINE
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

October 4, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
I. The District Of Columbia Circuit's Heightened Probable Cause Standard Cannot Be Reconciled With Precedents Of This Court Or Other Courts.	1
II. Even Assuming A Lack Of Probable Cause, This Court's Precedents Clearly Warrant Application Of Qualified Immunity	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page(s)
Anderson v. Creighton, 483 U.S. 635 (1987)	10
Ashcroft v. al-Kidd, 563 U.S. 731 (2011)	11
Carroll v. Carman, 135 S. Ct. 348 (2014)	11
City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765 (2015)	11
Criss v. Kent, 867 F.2d 259 (6th Cir. 1988)	7
Finigan v. Marshall, 574 F.3d 57 (2d Cir. 2009)	7
Florida v. Harris, 133 S. Ct. 1050 (2013)	3
Illinois v. Wardlow, 528 U.S. 119 (2000)	4
Maryland v. Pringle, 540 U.S. 366 (2003)	6
McGloin v. United States, 232 A.2d 90 (D.C. 1967)	10
Messerschmidt v. Millender, 132 S. Ct. 1235 (2012)	11
Mullenix v. Luna, 136 S. Ct. 305 (2015)	9, 10, 11
Plumhoff v. Rickard, 134 S. Ct. 2012 (2014)	11

TABLE OF AUTHORITIES—Continued

Page(s)

Reichle v. Howards,
132 S. Ct. 2088 (2012) 11

Ryburn v. Huff,
132 S. Ct. 987 (2012) 11

Stanton v. Sims,
134 S. Ct. 3 (2013) 11

Taylor v. Barkes,
135 S. Ct. 2042 (2015) 11

United States v. Arvizu,
534 U.S. 266 (2002) 3

Wilson v. Layne,
526 U.S. 603 (1999) 11

Wood v. Moss,
134 S. Ct. 2056 (2014) 11

Constitution

U.S. Const. amend. IV 9, 11

REPLY BRIEF FOR PETITIONERS

Metropolitan Police Department officers were called to the scene of a party at a vacant home at 1:30 a.m. The partiers scattered and hid, then gave inconsistent explanations for their presence. After learning that the partiers lacked the homeowner's permission to be there, the officers arrested them for trespassing. The court of appeals found that the officers should have accepted the claim of some of the partiers that they had been invited by someone named "Peaches," and should have rejected considerable circumstantial evidence that the partiers, instead of being innocent dupes, knew or should have known that their entry was unauthorized. In so holding, the court of appeals departed from this Court's well-established probable-cause precedent by requiring police to credit questionable claims of an innocent mental state absent direct evidence to the contrary.

But the errors go deeper. In holding that the officers were not at least entitled to qualified immunity, the court of appeals ignored this Court's numerous decisions reversing, sometimes summarily, denials of qualified immunity given the lack of a clearly established right. No less in the District of Columbia than elsewhere, this Court's protection of the doctrine of qualified immunity is necessary to ensure that police officers can enforce the law and protect the public.

I. The District Of Columbia Circuit's Heightened Probable Cause Standard Cannot Be Reconciled With Precedents Of This Court Or Other Courts.

1. In their brief in opposition, respondents make the same mistake as the court of appeals and apply an

elevated probable cause standard that fails to account for the totality of the circumstances observed by the officers. Respondents contend that the court considered three pieces of information in finding no probable cause—that "(1) Respondents uniformly stated that they had been invited to a party at the house; (2) the officers had uncontroverted statements from both Peaches and another attendee that Peaches told Respondents they could be there; and (3) the owner of the home [had been unsuccessful in] negotiating a lease with Peaches." (Opp. Br. 10 (citing App. 10a).) But tellingly, respondents do not mention here the other, incriminating facts known to the officers, including that the partiers scattered and hid when police arrived; the officers found scantily clad women with money in their garter belts and smelled marijuana in the home; the explanations for the partiers' presence in the empty home were neither uniform nor uncontroverted; and the homeowner informed the officers that the partiers lacked permission to be there.

Without mentioning the incriminating circumstances, respondents then argue that the cases cited in the petition do not conflict with the decision here because those cases involved incriminating evidence and such evidence supposedly was lacking here. (*See* Opp. Br. 11-15.) Respondents' denial of any conflict thus relies on a characterization of the "totality-of-the-circumstances test" that ignores the observations of the trained and experienced police officers on the scene.

Only later, after arguing against any conflict with those other decisions, do respondents mention the incriminating circumstances that suggest that the officers were reasonable in concluding that the partiers acted with the requisite culpability. But even

then, like the court of appeals below, respondents do not engage in the proper "totality of the circumstances" inquiry. Instead, respondents view each incriminating circumstance separately, in artificial isolation from each other and all of the other circumstances known to officers at the time of the arrest. (Opp. Br. 19-24.) They reject, one-by-one, each incriminating circumstance as insufficient on its own to establish probable cause. But, as this Court has recognized, such a "divide-and-conquer analysis" turns the "totality of the circumstances" test on its head. *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

Respondents' contortions serve to highlight how they cannot justify what the court of appeals did here: establish a rigid and far too demanding standard for probable cause when a suspect claims an innocent mental state to deny having committed a crime. Under this heightened standard, circumstantial evidence giving rise to reasonable doubts about the credibility of the suspect's claim are not sufficient grounds for probable cause to arrest. (App. 12a; *see* App. 125a-126a.) Instead, what is required by the court of appeals' ruling is direct, affirmative evidence akin to a witness statement that the suspect had the requisite mental state. (App. 12a; *see* App. 34a-35a.) Absent such direct, affirmative evidence, any reasonable grounds to question the suspect's credibility do not, according to the court, "carry weight." (App. 12a n.4.) But the standard for probable cause is far below that required for an ultimate conviction. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). The question, instead, is whether police have sufficient basis to believe that a crime has occurred. *Id.* at 1055-56. The officers' observations were plainly sufficient here.

2. Regarding the incriminating evidence, the court of appeals first explained that the partiers' act of scattering and hiding upon noticing uniformed officers at the front door is "not sufficient *standing alone* to create probable cause." (App. 16a (emphasis added).) Unable to deny what the court said, respondents adopt its approach as their own: "unprovoked flight, *without more*," cannot establish probable cause to arrest. (Opp. Br. 24 (emphasis added).) This Court, however, recognizes that flight or similar evasive behavior, while "not necessarily indicative of wrongdoing," is "certainly suggestive of such," and thus an obvious factor in the probable-cause analysis. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). It provides a reason to discredit a suspect's innocent state-of-mind explanation for otherwise unlawful conduct.

The court of appeals found that the partiers' presence in a vacant house late at night was not a factor either, because the "condition of the house, *on its own*," did not suggest that the entry was unauthorized. (App. 16a (emphasis added).) Respondents say the condition of the house was irrelevant since it was not "completely empty": it had a bare mattress, folding chairs, and working electricity. (Opp. Br. 19.) But in the totality of the circumstances, it is still relevant that the house was essentially unfurnished and in "disarray," and also that a neighbor told police it had been vacant for several months. (App. 119a.) That condition suggested that the partiers had some notice that their entry might be unauthorized. A court should weigh these facts in conjunction with all of the other circumstances, but the court of appeals did not.

Having previously relied on the purportedly "uncontroverted" statement from "Peaches" to police that she had invited the partiers, respondents argue

that her evasiveness and untruthfulness when making those statements does not matter. (Opp. Br. 22-23.) "Peaches" repeatedly hung up the phone on police, refused their request to return to the scene because she said she would be arrested, and misled police by stating that she had authority to use the home before admitting that she did not. (App. 50a, 54a.) Under the correct standard, these facts should be taken into account in assessing probable cause and, specifically, whether officers had to credit her claim of a bona fide invitation. The court of appeals' failure to give these facts any weight—because "Peaches" did not tell police that the partiers knew their entry was unauthorized—violated that standard. (*See* App. 11a-12a & n.4.) Such direct, affirmative evidence of a suspect's mental state is not required for probable cause to arrest.

Respondents take the same flawed approach to the partiers' inconsistent statements to police. After trumpeting the purported uniformity of those statements (Opp. Br. 10), they argue that the fact that those statements were not really uniform should not have given the officers reason to doubt the partiers' stories (Opp. Br. 22). Like the court of appeals, respondents give no weight to the fact that some partiers told police they were there for a bachelor party, that others said it was a birthday party, and that no one knew an essential detail of either story: who was the guest of honor? (*See* App. 119a.) Like the court of appeals, respondents believed it enough to consider only the partiers' claim that they had been invited to a party of some sort (Opp. Br. 22; App. 15a-16a); their "inconsistent and conflicting statements" about the details of the purported invitation simply do not matter, even if it suggested the partiers were lying

to the officers (App. 10a). Again, the totality of the circumstances test dictates otherwise.[1]

And there is more. Like the court of appeals, respondents casually dismiss the fact that officers smelled marijuana and observed activities consistent with a for-profit strip club. (App. 15a-16a & n.5; Opp. Br. 19-20.) The issue is not one of "moral sensibilities." (Opp. Br. 20.) Rather, it is common sense that a typical homeowner or resident, absent from the scene, would be reluctant to surrender the premises to a crowd of people to party with illegal drugs and strippers. *See Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (probable cause deals with "the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act"). Knowing as much, the partiers should have been more skeptical of any assurance by "Peaches" that their presence was welcome. And, of course, the homeowner told the police officers that it was *not* authorized. The police could reasonably conclude in light of the totality of suspicious circumstances that the partiers knew or should have known as much.

3. Under their improper, divide-and-conquer approach, respondents conclude that probable cause was lacking because the claim of invitation was "corroborated by the available evidence" and unimpeached by any "contrary evidence." (Opp. Br. 15.) This conclusion flies in the face of the totality-of-the-circumstances

---

[1] While respondents object now to consideration of this point because it mostly arises from the trial testimony (Opp. Br. 20-22), they did not object in the court below; indeed their briefing below also relied on the trial testimony (Appellees' Br. 35-37). In any event, the court of appeals considered the point, without any suggestion that it had been improperly presented. (App. 10a, 36a.)

inquiry. First, the "corroboration" was hardly independent: "Peaches" had been acting in concert with the partiers and was far from disinterested. The police did not have to take her word as the end of the matter even if she took blame upon herself; conspirators sometimes try to protect co-conspirators. Her "corroboration" also need not have been credited because she was evasive, uncooperative, and admittedly untruthful with the police about her own authority to use the house. (App. 50a, 54a.) Second, as just discussed, police had considerable, though circumstantial, "contrary evidence." This evidence would permit an officer to reasonably conclude that, despite the partiers' claim that they had been invited, they knew, or at least had reason to know, that their entry was unauthorized.

Thus, respondents' arguments fail to dispel the direct conflict between the court of appeals' decision here and those of other courts, which hold that police officers are not required to credit a suspect's claim of an innocent mental state where reasonable grounds exist to disbelieve the suspect. These other courts have so held when an apparent trespasser claims a good-faith belief in the right to enter, *see, e.g.*, *Finigan v. Marshall*, 574 F.3d 57, 61-63 (2d Cir. 2009), and when a suspect similarly asserts an innocent state of mind for other apparent offenses, *see, e.g.*, *Criss v. Kent*, 867 F.2d 259, 263 (6th Cir. 1988).

There is no merit to respondents' assertion that petitioners seek to impose their own rigid, "bright-line" rule. (Opp. Br. 16.) Petitioners are not arguing that police "may always discredit suspects' innocent explanations even when those explanations are corroborated." (Opp. Br. 16 (emphasis omitted).) Instead, petitioners argue that a court should assess the

totality of the circumstances, including the nature of any corroboration, to discern if reasonable grounds exist to discredit those explanations. It is respondents who try to justify the court of appeals' rigid rule: circumstantial evidence and reasonable credibility doubts cannot overcome a suspect's innocent state-of-mind explanation.

Nor should this Court credit respondents' argument that the danger of the decision "chilling" law enforcement is "overblown" and that this issue "is unlikely to recur often." (Opp. Br. 25-26.) Four judges below would have reheard this case en banc, as officers "often hear a variety of mens rea-related excuses" from suspects and, at the same time, lack direct evidence of a culpable mental state. (App. 126a.) As amicus notes, circumstantial evidence of culpability is frequently considered in many contexts, such as in investigation of property crimes, like theft and receiving stolen property; drug crimes; and sex crimes. (Int'l Mun. Lawyers Ass'n Amicus Br. 8-12.) The court of appeals has created a new rule, broadly applicable to these situations, that critically affects the ability of police to do their job and protect the public. That warrants this Court's review.

II. Even Assuming A Lack Of Probable Cause, This Court's Precedents Clearly Warrant Application Of Qualified Immunity.

The court of appeals reasoned that the law was clearly established in the relevant sense because (1) probable cause requires "some evidence" of each offense element, and (2) an element of trespassing is that the accused "knew or should have known that his entry was unwanted." (App. 23a.) Respondents devote much of their qualified-immunity discussion to showing that these two generalized propositions were

clearly established. (Opp. Br. 27-30.) But this discussion simply does not address petitioners' argument: these propositions are just too general to have provided the petitioner officers fair notice that their actions were unlawful in the particular situation they confronted. *See Mullenix v. Luna*, 136 S. Ct. 305, 308-09 (2015).

Respondents incorrectly argue that petitioners "frame the question far too narrowly." (Opp. Br. 31.) Petitioners frame it as whether probable cause exists to arrest when officers find "persons behaving suspiciously inside a vacant home, late at night, where the lawful owner disclaims their right to be there, but the suspects claim they were invited by someone who is not present and is uncooperative and untruthful with police." (Pet. 25-26.) This Court has recently applied a similar level of specificity in granting qualified immunity, recognizing that such specificity is "especially important in the Fourth Amendment context." *Mullenix*, 136 S. Ct. at 308-09. Having defined the clearly established law at a high level of generality, respondents notably offer no alternative formulation that approaches the requisite degree of specificity. That is because there is no alternative formulation that would justify the denial of qualified immunity to the two petitioner officers, who have been held personally liable for nearly $1 million in damages and attorneys' fees.

Like the court of appeals, respondents do not identify a single case finding probable cause lacking under remotely analogous facts. There is no such case, certainly not under District of Columbia law. In fact, the District of Columbia Court of Appeals has affirmed trespassing *convictions* despite suspects' innocent explanations for their presence. *See, e.g.*,

McGloin v. United States, 232 A.2d 90, 91 (D.C. 1967). Respondents fruitlessly attempt to distinguish these cases since none involved an explanation that "was corroborated by independent evidence." (Opp. Br. 32.) Even setting aside the much higher standard for a conviction than for probable cause, the "corroboration" from "Peaches" was not independent, and other objective reasons existed to discredit it, as discussed. In any event, "one thing is crystal clear: No decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances." (App. 136a.)

Claiming that the constitutional violation was nevertheless "obvious," respondents improperly rely on some other officers' subjective assessments of the trespassing charge. (Opp. Br. 34-35.) But these officers were not at the scene or did not possess all of the relevant information. (App. 51a-52a, 58a-59a.) Moreover, it is telling that respondents have to depart from the proper analysis, relying on subjective beliefs where qualified immunity "generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted). In light of pre-existing law, the unlawfulness of the arrests was not "apparent" to the petitioner officers. *Id.* at 640. The constitutional question they faced was not "beyond debate." *Mullenix*, 136 S. Ct. at 308.

Respondents insist that the lack of probable cause was "obvious" even though four judges of the District of Columbia Circuit, dissenting from the denial of rehearing, found that probable cause existed. (Opp. Br. 35.) This is flatly contrary to this Court's qualified immunity jurisprudence: "If judges thus disagree on a constitutional question, it is unfair to subject police to

money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Whatever may be an "obvious" case justifying the denial of qualified immunity, this is not it.

This Court should reverse the court of appeals, just as in recent cases arising from the Third, Fifth, Sixth, Ninth, and Tenth Circuits. Respondents claim that the denial of qualified immunity does not warrant review because it merely reflects "factbound disagreement" between the judges below. (Opp. Br. 35.) But a "factbound disagreement" could be said to characterize almost all qualified immunity cases, especially in the Fourth Amendment context. Nevertheless, because of the societal importance of qualified immunity, this Court "often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015); *see Mullenix*, 136 S. Ct. 305 (summary reversal); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (summary reversal); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (summary reversal); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (summary reversal); *Reichle v. Howards*, 132 S. Ct. 2088 (2012); *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (summary reversal); *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). This Court should not hesitate to do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE
ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

October 2016

RECORDS AND BRIEFS

No. 15-1485

Supreme Court, U.S.
FILED
JUL - 8 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, and ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS BRIEF OF THE STATE OF UTAH AND SEVENTEEN OTHER STATES IN SUPPORT OF PETITIONERS

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
**Counsel of Record*
KYLE J. KAISER
MEB W. ANDERSON
Assistant Attorneys General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov

Counsel for Amicus Curiae State of Utah

[Additional Counsel Listed At End]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

TABLE OF CONTENTS

Page

STATEMENT OF *AMICI* INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. States And Their Officials Rely On Federal Courts To Properly Apply Qualified Immunity So As Not To Unnecessarily Disrupt Governmental Functions 5

A. Qualified Immunity Yields Important Benefits To States And Their Officials, And To Society As A Whole 6

B. Law Enforcement Officers Who Reasonably But Mistakenly Conclude That Probable Cause Supports An Arrest Are Entitled To Qualified Immunity 9

II. The Court Of Appeals' Decision Denying Qualified Immunity To Petitioners Conflicts With Decisions Of This Court And Of Other Circuits, And Warrants Reversal 13

A. Petitioners' Conclusion That Probable Cause Supported Respondents' Arrests Was Objectively Reasonable, Even If Mistaken 14

B. The Cases That "Squarely Govern" Petitioners' Conduct Did Not Place Them On Notice That Respondents' Arrests Violated Clearly Established Law 18

TABLE OF CONTENTS – Continued

Page

III. The Court of Appeals' Pronounced Errors Warrant Summary Reversal.... 21

CONCLUSION..... 23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Williams, 407 U.S. 143 (1972).....11

Anderson v. Creighton, 483 U.S. 635 (1987).....*passim*

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 1, 7, 8

Beck v. Ohio, 379 U.S. 89 (1964) 10

Brosseau v. Haugen, 543 U.S. 194 (2004).....1, 7, 10

Carroll v. Carman, 135 S. Ct. 348 (2014).....22

City & Cnty. of San Francisco v. Sheehan,
135 S. Ct 1765 (2015)..... .. ..8, 21, 22

Davis v. Scherer, 468 U.S. 183 (1984).....8, 12

Florida v. Harris, 133 S. Ct. 1050 (2013).....10, 11

Garcia v. Jane & John Does 1-40,
779 F.3d 84 (2d Cir. 2015) 15

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....8, 9, 11, 16

Hunter v. Bryant, 502 U.S. 224 (1991).....*passim*

Malley v. Briggs, 475 U.S. 335 (1986)..... ....8, 9

Mullenix v. Luna, 136 S. Ct. 305 (2015).....6, 10, 22

Pearson v. Callahan, 555 U.S. 223 (2009) 6, 10, 22

Pierson v. Ray, 386 U.S. 547 (1967) 9

Plumhoff v. Rickard, 134 S. Ct. 2012 (2014).....12, 21

Ramirez v. City of Buena Park,
560 F.3d 1012 (9th Cir. 2009).....20

Ryburn v. Huff, 132 S. Ct. 987 (2012) 13, 22

Saucier v. Katz, 533 U.S. 194 (2001).....7, 21

TABLE OF AUTHORITIES – Continued

Page

Sennett v. United States,
667 F.3d 531 (4th Cir. 2012). 20

Stanton v. Sims, 134 S. Ct. 3 (2013).....21, 22

Taylor v. Barkes, 135 S. Ct. 2042 (2015) 22

United States v. Sharpe, 470 U.S. 675 (1985).....9

Wesby v. District of Columbia,
765 F.3d 13 (D.C. Cir 2014) 15

Wesby v. District of Columbia,
816 F.3d 96 (D.C. Cir. 2016) ....*passim*

STATE CASES

Artisst v. United States, 554 A.2d 327 (D.C. 1989) 20

McGloin v. United States,
232 A.2d 90 (D.C. 1967).....20

OTHER AUTHORITIES

Ramadanah M. Salaam, Hope v. Pelzer: *The Supreme Court Revisits the Qualified Immunity Defense*, 26 Am. J. Trial Advoc. 643 (2003).....8

The Federalist No. 51 (James Madison) (J Cooke ed. 1961) 5

STATEMENT OF *AMICI* INTEREST[1]

The States filing this *amicus* brief have a significant interest in ensuring that lower federal courts properly apply this Court's qualified immunity jurisprudence. Qualified immunity shields State officials from damages lawsuits under 42 U.S.C. § 1983 unless they are "plainly incompetent or . . . knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal quotation marks and citation omitted). Lower-court decisions that improperly narrow the qualified immunity defense – like the Court of Appeals' decision below – shrink the "breathing room" this Court has given State officials to govern and act when only opaque law guides their conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

This is especially so for police officers. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Anderson v. Creighton*, 483 U.S. 635, 644 (1987).

When lower courts ignore those teachings, they upset the careful balance that this Court's qualified

---

[1] The parties' counsel of record received notice of the intent to file this brief.

immunity precedent strikes in this critical area. Indeed, this case exemplifies the potentially dire consequences for State and local governments, their officers, and their constituents when that balance is upset. It warrants this Court's review.

SUMMARY OF ARGUMENT

Two police officers in the District of Columbia Metropolitan Police Department find themselves personally liable for a nearly $1 million judgment after losing qualified immunity (on summary judgment) for a § 1983 claim. For what allegedly unconstitutional act? Arresting twenty-one people for trespassing in a vacant house at 3:00 a.m. one Sunday morning, after the officers:

(1) received a complaint about raucous partying and possible illegal activity in the vacant house;

(2) went to the vacant house and saw that it lacked furnishings except a mattress on the floor and candles for light;

(3) discovered that the supposedly vacant house was far from deserted – twenty-one men and women (sixteen of whom are Respondents) were partying inside;

(4) watched some of the partiers run into other rooms upon the officers' arrival; or hide in closets; or remain in plain sight dressed only in bras and thong

underwear, with money hanging from their garter belts;

(5) smelled marijuana and saw the partiers holding cups of beer and liquor;

(6) heard inconsistent stories from the partiers – was it a bachelor party or a birthday party? – about why they were in the vacant house;

(7) learned that none of the partiers was the vacant house's owner, tenant, or lessee;

(8) heard from one or more of the partiers that a woman named "Peaches" or "Tasty" had invited them to the vacant house; yet

(9) confirmed that Peaches (or Tasty) was not then present in the vacant house;

(10) learned from a phone call with Peaches that she had invited the partiers to the vacant house, but under conflicting and evolving claims to authority – that she was "possibly" renting it, or negotiating a lease with the owner's grandson, or had received permission from the owner (or grandson) to host the party there – until she finally recanted and admitted that she in fact *did not* have permission to be in the vacant house, and had just left it, and would not return because she was afraid of being arrested; and

(11) spoke by phone to the vacant house's actual owner, who confirmed that he had discussed leasing the property to Peaches but had not yet signed a lease

agreement, and that the partiers *did not* have his permission to be in the vacant house.

(*See* Pet. 3-4.)

Amici agree with Petitioners that those facts established probable cause to arrest Respondents for trespassing. (*See* Pet. 17-19.) But this brief focuses on why the panel majority's decision stripping Petitioners of qualified immunity for arresting Respondents despite those facts – and the inferences an objectively reasonable officer could have drawn from them – also breaks from this Court's qualified immunity jurisprudence and warrants reversal.

First, the panel majority crafted a new rule that effectively injects an officer's subjective beliefs into the law of probable cause governing arrests for *mens rea* crimes. Under the panel majority's rule, when a suspect gives an excuse for his conduct, the inferences a reasonable officer *could have drawn* from that excuse (in light of other known facts) *cannot* be included within the totality of the circumstances establishing probable cause to arrest – unless the officer *subjectively* determined that the suspect's excuse could not be credited after accounting for all known facts.

Second, even if the panel majority's new rule were consistent with this Court's precedent – and it is not – at a minimum it adds an entirely new gloss on that precedent. By definition, new glosses cannot constitute clearly established law. Petitioners are thus entitled to

qualified immunity because their actions did not transgress any law or right about which they had clear notice.

ARGUMENT

I. States And Their Officials Rely On Federal Courts To Properly Apply Qualified Immunity So As Not To Unnecessarily Disrupt Governmental Functions.

"If men were angels, no government would be necessary." The Federalist No. 51, at 349 (James Madison) (J. Cooke ed. 1961). Our government's very existence thus attests that the women and men serving in it – like the citizens they serve – will not always perfectly comply with the law. They make mistakes.

But unlike all people, all mistakes are not created equal. Some arise from universal human foibles – well-meaning officials reasonably but mistakenly act based on misapprehended facts or unsettled law. Other mistakes, however, unreasonably violate a clear duty or law. Both reasonable and unreasonable mistakes can even violate citizens' constitutional rights.

When citizens seek redress for such violations, courts sort reasonable mistakes from unreasonable ones and grant qualified immunity to officials whose errors are reasonable. This Court's precedents teach (1) how courts identify reasonable mistakes, (2) how society benefits from making officials qualifiedly immune for reasonable mistakes, and (3) why qualified

immunity is available when law enforcement officers arrest criminal suspects on the reasonable but mistaken belief that probable cause supports the arrest. A proper understanding of each topic – discussed below – makes plain the error in the Court of Appeals' decision.

A. Qualified Immunity Yields Important Benefits To States And Their Officials, And To Society As A Whole.

This Court's precedents frown both on government officials unreasonably violating citizens' constitutional rights and on lawsuits against government officials for conduct that does not clearly cross that line. Neither is acceptable.

Qualified immunity helps to solve those two problems by "hold[ing] public officials accountable when they exercise power irresponsibly and" by "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). It protects "officials from civil liability" when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks and citations omitted).

Deciding when a law allegedly violated is "clearly established" is a crucial part of qualified-immunity analysis. "A Government official's conduct violates clearly established law when, at the time of the

challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (citations omitted).

Many of this Court's recent qualified immunity cases correct lower court decisions that unduly limit qualified immunity's availability by broadly defining when a challenged act's unlawfulness is apparent. Though the Court does "not require a case directly on point" before deeming a point of law to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. "We have repeatedly told courts . . . not to define clearly established law at a high level of generality." *Id.* at 742. Instead, the clearly-established inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). The dispositive question is "whether the violative nature of *particular* conduct is clearly established." *al-Kidd*, 563 U.S. at 742 (emphasis added). Only by applying qualified immunity's "clearly established" requirement this way will the defense obtain

its proper scope – "protect[ing] 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The benefits to State officials and to society from giving qualified immunity its due scope are well known. Officials benefit because qualified immunity gives them "breathing room to make reasonable but mistaken judgments." *Id.* at 743. Qualified immunity thus protects against a "chilling effect" on public officials' often difficult discretionary decisions. Ramadanah M. Salaam, Hope v. Pelzer: *The Supreme Court Revisits the Qualified Immunity Defense*, 26 Am. J. Trial Advoc. 643, 654 (2003). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)).

Those benefits for officials also confirm "the importance of qualified immunity 'to society as a whole.'" *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). Qualified immunity staves off significant "social costs" to State governments from improper lawsuits – "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. And qualified immunity encourages public officials to confidently use

their best judgment on the public's behalf "in the unflinching discharge of their duties." *Id.* (citation omitted).

B. Law Enforcement Officers Who Reasonably But Mistakenly Conclude That Probable Cause Supports An Arrest Are Entitled To Qualified Immunity.

Qualified immunity has long been available to law enforcement officers – both to those "who were alleged to have violated the Fourth Amendment" generally, *Anderson*, 483 U.S. at 643 (citing *Malley*, 475 U.S. at 344-45), and specifically to officers like Petitioners "who 'reasonably but mistakenly conclude that probable cause is present'" and justifies arresting criminal suspects, *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641); *see also Pierson v. Ray*, 386 U.S. 547, 557 (1967). Those cases emphasize three critical principles that govern decisions about whether qualified immunity should shield officers from personal liability for an allegedly unconstitutional arrest.

First, in assessing whether an arrest violates a "clearly established" right, the right allegedly violated must be more specific than the general right to be free from arrests unsupported by probable cause. *See United States v. Sharpe*, 470 U.S. 675, 691 (1985). Assessing the clearly-established question at that "level of generality" would allow plaintiffs "to convert the rule of qualified immunity that [this Court's] cases

plainly establish into a rule of virtually unqualified liability." *Anderson*, 483 U.S. at 639.

Instead, the clearly-established inquiry must be more "particularized" to the case: Qualified immunity applies unless "a reasonable offic[er] would understand that" the specific arrest under review "violates that right" to be free from arrests unsupported by probable cause. *Id.* at 640; *see also Mullenix*, 136 S. Ct. at 309-10 (summary reversal); *Pearson*, 555 U.S. at 223 (reversing denial of qualified immunity because the law governing the particular alleged unlawful entry was not clearly established); *Brosseau*, 543 U.S. at 201 (judging reasonableness against the backdrop of the law that "squarely governs" at the time of the conduct).

Second, because an arrest's lawfulness is inextricably tied to what probable cause requires, courts must properly account for the case-specific flexibility inherent in those requirements. Probable cause for an arrest exists "if 'at the moment the arrest was made . . . the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing'" that the suspect had committed a crime. *Hunter*, 502 U.S. at 228 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). That test "is not reducible to precise definition or quantification." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (internal quotation marks omitted). It is instead "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat

set of legal rules." *Id.* at 1056. And "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the probable-cause decision." *Id.* at 1055 (brackets omitted). Thus probable cause for an arrest may exist even if the officer lacks the quantum of evidence on an element of the crime that "would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972).

So when deciding whether probable cause supported an arrest, this Court has "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach" that "consistently look[s] to the totality of the circumstances." *Harris*, 133 S. Ct. at 1055. Officers may find probable cause based only on "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* (internal quotation marks and brackets omitted).

Third, under this fact-specific, totality-of-the-circumstances approach, whether an officer had probable cause to arrest "generally turns on the 'objective legal reasonableness'" of the arrest. *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819). Put differently, this Court's "cases establish that qualified immunity shields" officers "from suit for damages if 'a reasonable officer could have believed'" the arrest "'to be lawful, in light of clearly established law and the information the arresting officers possessed.'" *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641) (brackets omitted).

This objective inquiry is just that – objective. It "will often require examination of the information possessed by the" arresting officers, but it "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent." *Anderson*, 483 U.S. at 641. The officer's "subjective beliefs about the" arrest "are irrelevant." *Id.*

And a reviewing court's subjective beliefs are as irrelevant as the officer's. Courts must "analyze this question from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (internal quotation marks and citation omitted). The "court should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter*, 502 U.S. at 228.

Reviewing officers' acts for objective reasonableness – in lieu of a plaintiff's invitation to engage in Monday-morning quarterbacking – comports with this Court's "frequent[] observ[ations]" and its "many cases . . . amply demonstrat[ing]" the point that it is "difficult[] [to] determin[e] whether particular searches or seizures comport with the Fourth Amendment." *Anderson*, 483 U.S. at 644. Police officers, like the Petitioners here, "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them." *Davis*, 468 U.S. at 196. In such circumstances, "it is inevitable that law enforcement officials will in

some cases reasonably but mistakenly conclude that probable cause is present." *Anderson*, 483 U.S. at 641.

Even so, "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.* at 644. Thus "judges should be cautious about second-guessing a police officer's assessment, made on the scene." *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012).

In sum, law enforcement officers "are entitled to qualified immunity" if – under the totality of the circumstances – "a reasonable officer could have believed that probable cause existed to arrest" the criminal suspect "in light of clearly established law and the information the arresting officers possessed." *Hunter*, 502 U.S. at 227-28 (internal quotation marks and brackets omitted).

II. The Court Of Appeals' Decision Denying Qualified Immunity To Petitioners Conflicts With Decisions Of This Court And Of Other Circuits, And Warrants Reversal.

The panel majority broke from this well-established qualified-immunity precedent in two important ways that support this Court's review.

First, it turned the objective-reasonableness, totality-of-the-circumstances test into a subjective test

that can actually prohibit officers from considering all the circumstances. Now, an officer must form subjective views about a suspect's proffered excuse for his conduct, and those subjective views will determine whether inferences an objectively reasonable officer could have drawn from those excuses can be considered as part of the broader facts establishing probable cause to arrest for a *mens rea* crime. That rule is a new one never before applied in an American court.

Second, because that rule is new, the panel majority erred by applying it retroactively as clearly established law at the time Petitioners arrested Respondents. This Court has long taught that new law cannot be applied retroactively to deny immunity for prior acts that, by definition, could not have violated it. But the panel majority did just that. Either error alone warrants reversal.

A. Petitioners' Conclusion That Probable Cause Supported Respondents' Arrests Was Objectively Reasonable, Even If Mistaken.

The panel majority's decision to strip Petitioners of qualified immunity cannot be reconciled with this Court's rule "that officers 'who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.'" *Wesby v. District of Columbia*, 816 F.3d 96, 105 (D.C. Cir. 2016) (per curiam order den. pet. for reh'g en banc) (*Wesby II*) (Kavanaugh, J., dissenting

from den. of reh'g en banc) (quoting *Hunter*, 502 U.S. at 227).[2]

To be sure, the panel majority purports to avoid a conflict with *Hunter* by finding Petitioners' conclusion that they had probable cause to arrest Respondents to be *unreasonable* as a matter of law. "[N]o reasonable officer could have believed there was probable cause to arrest Plaintiffs for entering unlawfully," it reasoned, because the record lacked evidence of an element of the crime: Respondents' *mens rea*, or evidence "that a suspect 'knew or should have known that his entry was unwanted.'" *Wesby v. District of Columbia*, 765 F.3d 13, 26-27 (D.C. Cir. 2014) (*Wesby I*). In fact, according to the panel majority, "there was uncontroverted evidence that Plaintiffs believed they had entered at the invitation of a lawful occupant," *id.* at 26 – an assessment that, if true, would have eliminated probable cause for the arrest.

But that reasoning does not reconcile the decision below with *Hunter* – it fundamentally conflicts with it.

The most glaring conflict with *Hunter* is that, while paying lip service to the objective-reasonableness rule, the Court of Appeals effectively rewrites

---

[2] Ten courts of appeals now refer to the *Hunter* rule by the shorthand "arguable probable cause." *See Wesby II*, 816 F.3d at 105-06 (Kavanaugh, J., dissenting) (citing cases). "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Garcia v. Jane & John Does 1-40*, 779 F.3d 84, 92 (2d Cir. 2015) (citations omitted).

Hunter to create a subjective-reasonableness test when suspects of a *mens rea* crime give officers excuses for their conduct. *See Wesby II*, 816 F.3d at 101 (Pillard, J., concurring in the den. of reh'g en banc). For, according to the court, whether an objectively reasonable officer could have doubted the truthfulness of the suspects' excuses is irrelevant to determining probable cause to arrest in such circumstances; instead, what matters is whether the "officers *actually doubt* a suspect's credibility." *Id.* at 100 (Pillard, J., concurring) (emphasis added). Accordingly, only an officer's subjective "actual[] doubt[s]" arising from potentially bogus excuses can constitute "conflicting information" about a suspect's *mens rea* worthy of an officer's taking "into account when assessing whether the totality of the circumstances support probable cause." *Id.* (Pillard, J., concurring).

That reasoning is fundamentally irreconcilable with the bedrock rule that qualified immunity "generally turns on the 'objective legal reasonableness' of the action." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819). Objective tests, of course, ask what "a reasonable officer *could have believed*," *id.* at 641; what these *specific* officers "actually" believed, *Wesby II*, 816 F.3d at 100 (Pillard, J., concurring), matters not at all. Thus, any fair application of probable cause's objective test must include the judgments and conclusions an objectively reasonable officer *could have drawn* from the excuses – based on his training and experience – within the total information available in a probable-cause assessment, *regardless* of whether the specific

officers *actually* reached those conclusions. Yet the Court of Appeals walled off those considerations from the totality-of-the-circumstances calculus here because, in its view, Petitioners did not personally reach them.[3]

This never has been the law. Quite the contrary: Adhering to this Court's well-established precedent, all eleven courts of appeals that have addressed the issue (including a prior D.C. Circuit opinion) have held that judgments a reasonable officer *could have reached* about the suspect's truthfulness necessarily form part of the totality of the circumstances when assessing probable cause to arrest for a *mens rea* crime. *See Wesby II*, 816 F.3d at 107-08 (Kavanaugh, J., dissenting) (citing cases). The panel majority's clear break from these otherwise uniform cases warrants review and reversal.

Correcting for that one profound error confirms that Petitioners "are entitled to qualified immunity because they at least *reasonably could have believed* that they had probable cause" to arrest Respondents. *Id.* at 105 (Kavanaugh, J., dissenting) (emphasis in original). Respondents' conflicting excuses could have given an objectively reasonable officer ample reason to question

---

[3] The Court of Appeals' conclusions about Petitioners' subjective beliefs are flawed in their own right. They are based on inferences from the evidence drawn against Petitioners, contrary to Rule 56's command that inferences are to be drawn in the nonmoving party's favor. Petitioners did not need to introduce evidence of their subjective beliefs in any event; such evidence is irrelevant under this Court's qualified-immunity precedent.

Respondents' *mens rea* – especially when viewed in the context of the full panoply of facts Petitioners already knew when they arrested Respondents. So under a straightforward application of this Court's precedents, Petitioners are entitled to qualified immunity: They had at least arguable – if not actual – probable cause to arrest Respondents.

B. The Cases That "Squarely Govern" Petitioners' Conduct Did Not Place Them On Notice That Respondents' Arrests Violated Clearly Established Law.

Petitioners are entitled to qualified immunity for the separate reason that the law upon which the panel majority relied to strip them of qualified immunity – its novel, erroneous view of probable cause discussed above – was not clearly established. To be sure, the judges concurring in the denial of rehearing *en banc* disputed the dissenting judges' conclusion that they were applying a new rule, downplaying their disagreement about the outcome here as "entirely fact-bound." *Wesby II*, 816 F.3d at 101 (Pillard, J., concurring) (internal quotation marks omitted). But this *post-hoc* justification actually proves otherwise.

In particular, on denial of rehearing *en banc*, the concurring judges "critici[zed]" the dissenting judges' view of probable cause, *id.* at 99 – evincing discord on a legal question that is indispensable to the panel majority's erroneous holding. Put simply, the dispositive disagreement between the concurring and dissenting

judges is a legal one: Whether inferences and conclusions a reasonable officer *could have drawn* from a suspect's own excuse for a *mens rea* crime should count as part of the totality of the circumstances that establish probable cause to arrest for that crime.

The concurring judges think not. In their view, inferences or conclusions an objectively reasonable officer could have drawn from those facts are "speculat[ive]" Band-Aids that cover investigatory gaps arising from a lack of tangible, real "evidence in the record." *Id.* (Pillard, J., concurring). And by "suggesting that" such speculation "could suffice to support probable cause" despite those gaps, the dissent allegedly "impermissibly shift[s] the burden of discerning probable cause." *Id.* at 100 (Pillard, J., concurring). "Officers may not do what the dissent does – posit that a person is up to no good and then ask whether there is clear reason to rule out any theoretical wrongdoing." *Id.* (Pillard, J., concurring). Indeed, the "bare, unsupported possibility that an officer *might have* disbelieved" Respondents' excuses "is not ground for arrest – nor for qualified immunity" – unless those "officers actually doubt [Respondents'] credibility." *Id.* (Pillard, J., concurring).

But that reasoning turns the firmly entrenched principles of probable cause discussed above on their head. The panel majority cites no case holding that inferences or conclusions an objectively reasonable officer *could have drawn* from the totality of circumstances to support probable cause must be *excluded* from that calculus when (1) a suspect's *mens*

rea is an element of the crime, (2) the suspect offers an innocent explanation for his conduct, and (3) the officer subjectively did not doubt those explanations. Neither have *amici* found one.

The absence of such authority is not surprising: The panel majority's view appears to contradict the otherwise uniform view of the courts of appeals. A suspect's "innocent explanations for his odd behavior cannot eliminate the suspicious facts from the probable cause calculus." *Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (quoting *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009)). That's because "[t]he test [for probable cause] is not whether the conduct under question is consistent with innocent behavior; law enforcement officers do not have to rule out the possibility of innocent behavior." *Id.* (quoting *Ramirez*, 560 F.3d at 1024); *see also Wesby II*, 816 F.3d at 107-08 (Kavanaugh, J., dissenting) (citing cases).

As a result, whatever else might be said about the panel majority's view, "one thing is crystal clear: No decision prior to the panel opinion here had prohibited arrest under D.C. law in these circumstances." *Wesby II*, 816 F.3d at 111 (Kavanaugh, J., dissenting). On the contrary – applicable D.C. Court of Appeals case law "clearly *permits* police officers to arrest a person for trespassing even when that person claims to have the right to be on the property, if a reasonable officer could disbelieve the suspected trespasser." *Id.*; *see also id.* at 109 (citing *Artisst v. United States*, 554 A.2d 327 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90 (D.C. 1967)). "It is especially troubling that the [D.C.] Circuit

would conclude that [Petitioners were] plainly incompetent – and subject to personal liability for damages – based on actions that were lawful according to courts in the jurisdiction where [they] acted." *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013).

So "[t]his should have been a fairly easy case for qualified immunity." *Wesby II*, 816 F.3d at 111 (Kavanaugh, J., dissenting). Regrettably, the panel majority did what this Court "has repeatedly told [it] not to do" – "create[] a new rule and then appl[y] that new rule retroactively against the police officers." *Id.* at 111 (Kavanaugh, J., dissenting).

III. The Court of Appeals' Pronounced Errors Warrant Summary Reversal.

The questions presented here are certworthy in their own right. (*See* Pet. at 11-16.) But because the Court of Appeals' errors are, at their core, different shades of gloss applied to a familiar sow's lips, summary reversal is also appropriate.

Specifically, the Court of Apeals failed to assess Petitioners' determination of probable cause for objective reasonableness – something this Court has repeatedly instructed lower courts to do. *E.g.*, *Hunter*, 502 U.S. at 227; *Anderson*, 483 U.S. at 638-39. And it failed to recognize that government officials have to be on notice that their conduct violates clearly established law – another principle this Court has repeatedly taught to lower courts. *E.g.*, *Sheehan*, 135 S. Ct. at 1777; *Plumhoff*, 134 S. Ct. at 2023; *Saucier*, 533 U.S. at

202, *overruled on other grounds by Pearson*, 555 U.S. at 223. All these prior cases "should have" made this "a fairly easy case for qualified immunity." *Wesby II*, 816 F.3d at 111 (Kavanaugh, J., dissenting).

Amici do not lightly suggest summary reversal. Yet that outcome follows from this Court's "often correct[ing] lower courts when they wrongly subject individual officers to liability," due largely to the "importance of qualified immunity to society as a whole." *Sheehan*, 135 S. Ct. at 1774 n.3 (citations and quotations omitted). Many of those decisions summarily reversed denials of qualified immunity to correct manifest error in the courts of appeals. *E.g.*, *Mullenix*, 136 S. Ct. at 309-10 (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Stanton*, 134 S. Ct. at 4-5 (per curiam); *Ryburn*, 132 S. Ct. 987 (per curiam). The errors here resemble those that the Court summarily corrected in those cases.

Indeed, the Court of Appeals did not have to reach the constitutional issue, but instead should have held that the contours of the rights Respondents asserted were not clearly established. *See Pearson*, 555 U.S. at 227. As this Court's precedents demonstrate, summary reversal is appropriate to correct that error. *E.g.*, *Carroll*, 135 S. Ct. at 348; *Stanton*, 134 S. Ct. at 7.

CONCLUSION

This Court should summarily reverse the judgment of the Court of Appeals. Alternatively, it should grant certiorari and reverse.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
*Counsel of Record
KYLE J. KAISER
MEB W. ANDERSON
Assistant Attorneys General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov

Counsel for Amicus Curiae
State of Utah

July 2016

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
STATE OF ALABAMA

LESLIE RUTLEDGE
Attorney General
STATE OF ARKANSAS

DOUGLAS S. CHIN
Attorney General
STATE OF HAWAI'I

GREGORY F. ZOELLER
Attorney General
STATE OF INDIANA

DEREK SCHMIDT
Attorney General
STATE OF KANSAS

ANDY BESHEAR
Attorney General
COMMONWEALTH
OF KENTUCKY

BILL SCHUETTE
Attorney General
STATE OF MICHIGAN

JIM HOOD
Attorney General
STATE OF MISSISSIPPI

ADAM PAUL LAXALT
Attorney General
STATE OF NEVADA

JOSEPH A. FOSTER
Attorney General
STATE OF NEW HAMPSHIRE

MICHAEL DEWINE
Attorney General
STATE OF OHIO

PETER F. KILMARTIN
Attorney General
STATE OF RHODE ISLAND

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA

KEN PAXTON
Attorney General
STATE OF TEXAS

ROBERT W. FERGUSON
Attorney General
STATE OF WASHINGTON

PATRICK MORRISEY
Attorney General
STATE OF WEST VIRGINIA

BRAD D. SCHIMEL
Attorney General
STATE OF WISCONSIN

:CORD
AND
VIEFS

No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

KARL A. RACINE
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

Counsel for Petitioners

NATHANIEL P. GARRETT
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104-1500
(415) 875-5731
ngarrett@jonesday.com

Counsel for Respondents

PETITION FOR WRIT OF CERTIORARI FILED: JUNE 8, 2016
CERTIORARI GRANTED: JANUARY 19, 2017

TABLE OF CONTENTS[1]

Page

Relevant Docket Entries

U.S. District Court District of Columbia (Washington, DC), 1:09-cv-00501-RC 1

United States Court of Appeals for District of Columbia Circuit, Docket No. 12-7127 19

Deposition of Sanjah Hunt (Docket Nos. 25-2, 31-11, 33-1) 34

Deposition of Natasha Chittams (Docket Nos. 25-3, 31-10, 33-2) 39

Deposition of Sergeant Andre Suber (Docket Nos. 25-4, 31-17, 32-2, 33-3) 51

Deposition of Officer Edwin Espinosa (Docket Nos. 25-5, 33-4) 66

Deposition of Officer Anthony Campanale (Docket Nos. 25-6, 31-16, 33-5) 70

Deposition of Officer Faraz Khan (Docket Nos. 25-7, 33-6) 81

Deposition of Officer Jason Newman (Docket Nos. 25-8, 33-7) 86

Deposition of Officer Andre Parker (Docket Nos. 25-9, 31-9, 33-8) 92

[1] Where pages from a single deposition span multiple exhibits, those pages are now consolidated into one document included chronologically where the deposition first appears in the record.

TABLE OF CONTENTS—Continued

Page

Defendants' Responses to Plaintiffs' Statement of Material Facts Not in Dispute (Docket No. 30-1) 104

Metropolitan Police Department Arrest Report (Docket No. 31-4) 111

Deposition of Ethelbert Louis (Docket No. 31-12) 113

Deposition of Brittany Stribling (Docket No. 31-13) 117

Deposition of Lynn Taylor (Docket No. 31-14) ... 121

Deposition of Alissa Cole (Docket No. 31-15) 125

Defendant Anthony Campanale's Responses to Interrogatories (Docket No. 31-19) 129

Defendant Edwin Espinosa's Responses to Interrogatories (Docket No. 31-20) 141

Defendant Faraz Khan's Responses to Interrogatories (Docket No. 31-21) 152

Defendant Andre Parker's Responses to Interrogatories (Docket No. 31-22) 163

Defendant Jason Newman's Responses to Interrogatories (Docket No. 31-23) 175

Plaintiffs' Response to Defendants' Alleged Facts as to Which There Is No Genuine Dispute (Docket No. 33-10) 186

NOTICE

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

MEMORANDUM OPINION AND ORDER, U.S. District Court for the District of Columbia (January 18, 2012) 45a

OPINION, U.S. Court of Appeals for the District of Columbia Circuit (September 2, 2014) 1a

ORDER, ON PETITION FOR REHEARING EN BANC, U.S. Court of Appeals for the District of Columbia Circuit (February 8, 2016) 102a

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA (WASHINGTON, DC)

1:09-cv-00501-RC

WESBY *et al.*,

v.

DISTRICT OF COLUMBIA *et al.*,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
03/13/2009	1	COMPLAINT against DISTRICT OF COLUMBIA, EDWIN ESPINOSA, J. NEWMAN, A. CAMPANALE, ANDRE PARKER, FARAZ KHAN (Filing fee $ 350, receipt number 4616019104) filed by JOSEPH MAYFIELD, JR, JUAN C. WILLIS, LYNN WARWICK TAYLOR, NATASHA CHITTAMS, OWEN GAYLE, SHANJAH HUNT, SIDNEY A. BANKS, JR, STANLEY RICHARDSON, THEODORE WESBY, ALISSA COLE, ANTHONY MAURICE HOOD, BRITTANY C. STRIBLING, CLARENCE BALDWIN, ETHELBERT LOUIS, GARY GORDON, JAMES DAVIS. (Attachments: # 1 Civil Cover Sheet)(jf,) (Entered: 03/17/2009)

DATE	NO.	DOCKET TEXT
		* * *
07/15/2009	8	ANSWER to 1 Complaint, with Jury Demand by DISTRICT OF COLUMBIA. Related document: 1 Complaint, filed by JAMES DAVIS, NATASHA CHITTAMS, CLARENCE BALDWIN, GARY GORDON, JUAN C. WILLIS, SIDNEY A. BANKS, JR., THEODORE WESBY, BRITTANY C. STRIBLING, SHANJAH HUNT, ALISSA COLE, STANLEY RICHARDSON, LYNN WARWICK TAYLOR, JOSEPH MAYFIELD, JR., OWEN GAYLE, ETHELBERT LOUIS, ANTHONY MAURICE HOOD.(Frost, Shana) (Entered: 07/15/2009)
07/23/2009	9	ANSWER to 1 Complaint, with Jury Demand by A. CAMPANALE. Related document: 1 Complaint, filed by JAMES DAVIS, NATASHA CHITTAMS, CLARENCE BALDWIN, GARY GORDON, JUAN C. WILLIS, SIDNEY A. BANKS, JR., THEODORE WESBY, BRITTANY C. STRIBLING, SHANJAH HUNT, ALISSA COLE, STANLEY RICHARDSON, LYNN WARWICK TAYLOR, JOSEPH MAYFIELD, JR., OWEN GAYLE, ETHELBERT LOUIS, ANTHONY MAURICE HOOD.(Frost, Shana) (Entered: 07/23/2009

DATE	NO.	DOCKET TEXT
07/23/2009	10	ANSWER to 1 Complaint, with Jury Demand by ANDRE PARKER. Related document: 1 Complaint, filed by JAMES DAVIS, NATASHA CHITTAMS, CLARENCE BALDWIN, GARY GORDON, JUAN C. WILLIS, SIDNEY A. BANKS, JR., THEODORE WESBY, BRITTANY C. STRIBLING, SHANJAH HUNT, ALISSA COLE, STANLEY RICHARDSON, LYNN WARWICK TAYLOR, JOSEPH MAYFIELD, JR., OWEN GAYLE, ETHELBERT LOUIS, ANTHONY MAURICE HOOD.(Frost, Shana) (Entered: 07/23/2009)
07/24/2009	11	ANSWER to 1 Complaint, with Jury Demand by J. NEWMAN. Related document: 1 Complaint, filed by JAMES DAVIS, NATASHA CHITTAMS, CLARENCE BALDWIN, GARY GORDON, JUAN C. WILLIS, SIDNEY A. BANKS, JR., THEODORE WESBY, BRITTANY C. STRIBLING, SHANJAH HUNT, ALISSA COLE, STANLEY RICHARDSON, LYNN WARWICK TAYLOR, JOSEPH MAYFIELD, JR., OWEN GAYLE, ETHELBERT LOUIS, ANTHONY MAURICE HOOD.(Frost, Shana) (Entered: 07/24/2009)

DATE	NO.	DOCKET TEXT
07/24/2009	12	ANSWER to 1 Complaint, with Jury Demand by FARAZ KHAN. Related document: 1 Complaint, filed by JAMES DAVIS, NATASHA CHITTAMS, CLARENCE BALDWIN, GARY GORDON, JUAN C. WILLIS, SIDNEY A. BANKS, JR., THEODORE WESBY, BRITTANY C. STRIBLING, SHANJAH HUNT, ALISSA COLE, STANLEY RICHARDSON, LYNN WARWICK TAYLOR, JOSEPH MAYFIELD, JR., OWEN GAYLE, ETHELBERT LOUIS, ANTHONY MAURICE HOOD.(Frost, Shana) (Entered: 07/24/2009)
07/24/2009	13	ANSWER to 1 Complaint, with Jury Demand by EDWIN ESPINOSA. Related document: 1 Complaint, filed by JAMES DAVIS, NATASHA CHITTAMS, CLARENCE BALDWIN, GARY GORDON, JUAN C. WILLIS, SIDNEY A. BANKS, JR., THEODORE WESBY, BRITTANY C. STRIBLING, SHANJAH HUNT, ALISSA COLE, STANLEY RICHARDSON, LYNN WARWICK TAYLOR, JOSEPH MAYFIELD, JR., OWEN GAYLE, ETHELBERT LOUIS, ANTHONY MAURICE HOOD.(Frost, Shana) (Entered: 07/24/2009)

* * *

DATE	NO.	DOCKET TEXT
01/11/2011	25	MOTION for Summary Judgment by STANLEY RICHARDSON, BRITTANY C. STRIBLING, LYNN WARWICK TAYLOR, THEODORE WESBY, JUAN C. WILLIS (Attachments: # 1 Statement of Material Facts Not In Dispute, # 2 Exhibit Excerpts of Hunt's Dep., # 3 Exhibit Excerpts of Chittams' Dep, # 4 Exhibit Excerpts of Suber's Dep, # 5 Exhibit Excerpt of Espinosa's Dep., # 6 Exhibit Excerpts of Campanale's Dep., # 7 Exhibit Excerpts of Khan's Dep., # 8 Exhibit Excerpts of Newman's Dep., # 9 Exhibit Excerpts of Parker's Dep.)(Lattimer, Gregory) (Entered: 01/12/2011)
01/21/2011		Case reassigned to U.S. District Judge Robert L. Wilkins. Judge Richard W. Roberts no longer assigned to the case. (gt,) (Entered: 01/21/2011)
01/24/2011	26	MOTION for Extension of Time to File *Opposition to Plaintiffs' motion for summary judgment and file a cross motion for summary judgment* by A. CAMPANALE, DISTRICT OF COLUMBIA, EDWIN ESPINOSA, FARAZ KHAN, J. NEWMAN, ANDRE PARKER (Baker, Denise) (Entered: 01/24/2011)
01/31/2011	27	Memorandum in opposition to re 26 MOTION for Extension of Time to File *Opposition to Plaintiffs' motion*

DATE	NO.	DOCKET TEXT
		for summary judgment and file a cross motion for summary judgment filed by THEODORE WESBY. (Lattimer, Gregory) (Entered: 01/31/2011)
02/01/2011	28	REPLY to opposition to motion re 26 MOTION for Extension of Time to File *Opposition to Plaintiffs' motion for summary judgment and file a cross motion for summary judgment* filed by A. CAMPANALE, DISTRICT OF COLUMBIA, EDWIN ESPINOSA, FARAZ KHAN, J. NEWMAN, ANDRE PARKER. (Baker, Denise) (Entered: 02/01/2011)
03/11/2011	29	MOTION for Hearing by THEODORE WESBY (Lattimer, Gregory) (Entered: 03/11/2011)
03/17/2011		MINUTE ORDER granting 26 Motion for Extension of Time to toOppose Plaintiffs Motion for Summary Judgment and file their Cross Motion for Summary; it is hereby ORDERED that the District Defendants shall file their Opposition to Motion for Summary Judgment and their Motion for Summary Judgment on or before April 1, 2011. Signed by Judge Robert L. Wilkins on 3/17/2011. (tcb) (Entered: 03/17/2011)
03/17/2011		MINUTE ORDER denying 29 Motion to Convene Status Hearing. Signed

DATE	NO.	DOCKET TEXT
		by Judge Robert L. Wilkins on 3/17/2011. (tcb) (Entered: 03/17/2011)
04/01/2011	30	Memorandum in opposition to re 25 MOTION for Summary Judgment filed by A. CAMPANALE, DISTRICT OF COLUMBIA, EDWIN ESPINOSA, FARAZ KHAN, J. NEWMAN, ANDRE PARKER. (Attachments: # 1 Statement of Facts)(Baker, Denise) (Entered: 04/01/2011)
04/01/2011	31	MOTION for Summary Judgment by DISTRICT OF COLUMBIA, EDWIN ESPINOSA, FARAZ KHAN, J. NEWMAN, ANDRE PARKER (Attachments: # 1 Memorandum in Support, # 2 Statement of Facts, # 3 Text of Proposed Order, # 4 Exhibit A, # 5 Exhibit B, # 6 Exhibit C, # 7 Exhibit D, # 8 Exhibit E, # 9 Exhibit F, # 10 Exhibit G, # 11 Exhibit H, # 12 Exhibit I, # 13 Exhibit J, # 14 Exhibit K, # 15 Exhibit L, # 16 Exhibit M, # 17 Exhibit N, # 18 Exhibit O, # 19 Exhibit P, # 20 Exhibit Q, # 21 Exhibit R, # 22 Exhibit S, # 23 Exhibit T)(Baker, Denise) (Entered: 04/01/2011)
04/11/2011	32	REPLY to opposition to motion re 25 MOTION for Summary Judgment filed by STANLEY RICHARDSON, BRITTANY C. STRIBLING, LYNN WARWICK TAYLOR, THEODORE

DATE	NO.	DOCKET TEXT
		WESBY. (Attachments: # 1 Reply to Response to Statement of Material Facts, # 2 Exhibit 3A - Excerpts of Suber Deposition, # 3 Exhibit 9 - Criminal Case Docket Sheets) (Lattimer, Gregory) (Entered: 04/11/2011)
04/18/2011	33	Memorandum in opposition to re 31 MOTION for Summary Judgment filed by STANLEY RICHARDSON, BRITTANY C. STRIBLING, LYNN WARWICK TAYLOR, THEODORE WESBY. (Attachments: # 1 Exhibit Hunt Depo, # 2 Exhibit Chittaams Depo, # 3 Exhibit Suber Depo, # 4 Exhibit Espinosa Depo, # 5 Exhibit Campanale Depo, # 6 Exhibit Khan Depo, # 7 Exhibit Newman Depo, # 8 Exhibit Parker Depo, # 9 Exhibit Criminal Docket Sheet, # 10 Statement of Facts)(Lattimer, Gregory) (Entered: 04/18/2011)
04/26/2011	34	MOTION for Extension of Time to File Response/Reply *to Plaintiffs' Opposition to District Defendants' Motion for Summary Judgment* by A. CAMPANALE, DISTRICT OF COLUMBIA, EDWIN ESPINOSA, FARAZ KHAN, J. NEWMAN (Baker, Denise) (Entered: 04/26/2011)
04/28/2011		MINUTE ORDER granting 34 Motion for Extension of Time to File Response/Reply re 31 MOTION for

DATE	NO.	DOCKET TEXT
		Summary Judgment ; Set/Reset Deadlines: Replies due by 5/4/2011. Signed by Judge Robert L. Wilkins on 4/28/2011. (Wilkins, Robert) (Entered: 04/28/2011)
05/03/2011	35	Second MOTION for Extension of Time to File Response/Reply by A. CAMPANALE, DISTRICT OF COLUMBIA, EDWIN ESPINOSA, FARAZ KHAN, J. NEWMAN, ANDRE PARKER (Baker, Denise) (Entered: 05/03/2011)
05/04/2011		MINUTE ORDER granting 35 Motion for Extension of Time to File Response/Reply ; Set/Reset Deadlines: Replies due by 5/12/2011. Signed by Judge Robert L. Wilkins on 5/4/2011. (Wilkins, Robert) (Entered: 05/04/2011)
05/12/2011	36	REPLY to opposition to motion re 31 MOTION for Summary Judgment filed by A. CAMPANALE, DISTRICT OF COLUMBIA, EDWIN ESPINOSA, FARAZ KHAN, J. NEWMAN, ANDRE PARKER. (Baker, Denise) (Entered: 05/12/2011)
11/29/2011	37	SUPPLEMENTAL MEMORANDUM to re 33 Memorandum in Opposition, *to defendants motion for summary judgment* filed by NATASHA CHITTAMS, ALISSA COLE, JAMES DAVIS. (Attachments: # 1 Exhibit

DATE	NO.	DOCKET TEXT
		Judicial Summonses (Charging Documents))(Lattimer, Gregory) (Entered: 11/29/2011)
01/05/2012	38	NOTICE of filing supplemental documents by Defendants at the request of the court. Received in chambers via email on 11/29/11 (lcrlw1,) (Entered: 01/05/2012)
01/18/2012	39	MEMORANDUM AND OPINION on Defendants' Motion for Summary Judgment 31 and Plaintiffs' Motion for Summary Judgment 25 . Signed by Judge Robert L. Wilkins on 1/18/12. (lcrlw1,) (Entered: 01/18/2012)
01/18/2012	40	ORDER granting in part and denying in part 25 Plaintiffs' Motion for Summary Judgment; granting in part and denying in part 31 Defendants' Motion for Summary Judgment. Signed by Judge Robert L. Wilkins on 1/18/12. (lcrlw1,) (Entered: 01/18/2012)
		* * *
10/23/2012	57	NOTICE *of Filing of Proposed Order Dismissing Certain Claims* by A. CAMPANALE, DISTRICT OF COLUMBIA, EDWIN ESPINOSA, FARAZ KHAN, J. NEWMAN, ANDRE PARKER (Attachments: # 1 Text of Proposed Order Proposed Order dismissing certain claims)

DATE	NO.	DOCKET TEXT
		(Pittman, Jonathan) (Entered: 10/23/2012)
10/24/2012	58	ORDER DISMISSING CERTAIN CLAIMS WITH PREJUDICE: In light of Plaintiffs decision not to pursue certain claims, the Court hereby dismisses the following claims pursuant to Fed. R. Civ P. 41(a)(2) with prejudice:1. All claims for deprivation of civil rights under 42 U.S.C. § 1983 (Count I of the Complaint) against Defendant Officers Jason Newman, Edwin Espinosa and Faraz Khan, in their individual capacities, arising out of the arrest of plaintiffs for unlawful entry. 2. All claims for deprivation of civil rights under 42 U.S.C. § 1983 (Count I of the Complaint) against Defendant Officers Anthony Campanale, Andre Parker, Jason Newman, Edwin Espinosa and Faraz Khan, in their individual capacities, arising out of the arrest of plaintiffs for disorderly conduct. 3. All claims for false arrest (Count II of the Complaint) against Defendant Officers Jason Newman, Edwin Espinosa and Faraz Khan, in their individual capacities, arising out of the arrest of plaintiffs for unlawful entry. 4. All claims for false arrest (Count II of the Complaint) against Defendant Officers Anthony Campanale, Andre Parker, Jason

DATE	NO.	DOCKET TEXT
		Newman, Edwin Espinosa and Faraz Khan, in their individual capacities, arising out of the arrest of plaintiffs for disorderly conduct. Signed by Judge Robert L. Wilkins on 10/24/2012. (tcb) (Entered: 10/24/2012)
		* * *
11/01/2012		Minute Entry for proceedings held before Judge Robert L. Wilkins: Jury Selection begun and concluded on 11/1/2012. Eight (8) Jurors selected and sworn. Jury trial held and set to resume on Friday, November 2, 2012 at 9:30 AM in Courtroom 27A before Judge Robert L. Wilkins. (Court Reporter Rebecca Stonestreet) (tcb) (Entered: 11/01/2012)
11/02/2012		Minute Entry for proceedings held before Judge Robert L. Wilkins: Jury Trial held and resumed on 11/2/2012. Same eight (8) jurors. Jury Trial continued to 11/6/2012 at 9:15 AM in Courtroom 27A before Judge Robert L. Wilkins. Plaintiff's Witness: Natasha Chittams, Lynn Taylor, James Davis, Alissa Cole, Sandra Hunt, Juan C. Willis, Stanley Richardson and Clarence Baldwin. (Court Reporter Rebecca Stonestreet) (tcb) (Entered: 11/02/2012)
11/06/2012		Minute Entry for proceedings held before Judge Robert L. Wilkins: Jury

DATE	NO.	DOCKET TEXT
		Trial resumed and held on 11/6/2012. Same Eight (8) Jurors. Plaintiff's Witness: Brittany Stribling, Joseph Mayfield, Sidney Banks, Owen Gail, Theodore Wesby, Anthony Hood and Ethelbert Louis. Plaintiff's rest. Defendant's Oral Motion to Dismiss claims as to Plaintiff Gary Gordon; Heard and Denied. With respect to dismissal of claims as to Plaintiff Gary Gordon for punitive damages; Heard and taken under advisement. Jury Trial continued to 11/7/2012 at 9:30 AM in Courtroom 27A before Judge Robert L. Wilkins. (Court Reporter Rebecca Stonestreet) (tcb) . (Entered: 11/06/2012)
11/07/2012	67	NOTICE: Attached is the proposed Verdict Form the Court intends to use for the trial. The parties will have an opportunity to raise any objections and propose any revisions to this form. (lcrlw1) (Entered: 11/07/2012)
11/07/2012	68	NOTICE: Attached are the proposed Jury Instructions the Court intends to use for the trial. The parties will have an opportunity to raise any objections and propose any revisions to these instructions. (lcrlw1) (Entered: 11/07/2012)
11/07/2012		Minute Entry for proceedings held before Judge Robert L. Wilkins: Jury

DATE	NO.	DOCKET TEXT
		Trial resumed and held on 11/7/2012. Same Eight (8) Jurors. Defendants Witness: Anthony Campanale and Andre Parker. Defendants rest. Defendant's Oral Motion to Strike any claim for punitive damages and Oral Rule 50 Motion; Heard and DENIED for reasons stated on the record in open court. Defendant's Oral Motion to Reconsider Summary Judgment Ruling; Heard and DENIED for reasons stated on the record in open court. Jury Trial continued 11/8/2012 at 9:30 AM in Courtroom 27A before Judge Robert L. Wilkins. (Court Reporter Rebecca Stonestreet) (tcb) (Entered: 11/07/2012)
11/08/2012	69	NOTICE *of District Defendants' Request for Additional Jury Instruction* by A. CAMPANALE, DISTRICT OF COLUMBIA, ANDRE PARKER (Pittman, Jonathan) (Entered: 11/08/2012)
11/08/2012		Minute Entry for proceedings held before Judge Robert L. Wilkins: Jury Trial resumed and concluded on 11/8/2012. Same Eight (8) Jurors. Jury Deliberation held and concluded on 11/8/2012. Jury Verdict in favor of Plaintiffs Natasha Chittams, Lynn Taylor, James Davis, Alissa Cole, Sandra Hunt, Juan C. Willis,

DATE	NO.	DOCKET TEXT
		Stanley Richardson and Clarence Baldwin,Brittany Stribling, Joseph Mayfield, Sidney Banks, Owen Gail, Theodore Wesby, Anthony Hood and Ethelbert Louis and Gary Gordon against Officer Anthony Campanale, Officer Andre Parker and the District of Columbia. Jury panel discharged. (Court Reporter Chantal Geneus) (tcb) (Entered: 11/09/2012)
11/08/2012	70	ATTORNEYS' ACKNOWLEDGEMENT OF TRIAL EXHIBITS. (tcb) (Entered: 11/09/2012)
11/08/2012	71	Jury Notes(1). (tcb) (Entered: 11/09/2012)
11/08/2012	72	Signature Page of Foreperson in Jury Note. (Access to the PDF Document is restricted pursuant to the E-Government Act. Access is limited to Counsel of Record and the Court.). (tcb) (Entered: 11/09/2012)
11/08/2012	73	JURY VERDICT. (tcb) (Entered: 11/09/2012)
11/08/2012	74	Signature Page of Foreperson in Jury Verdict. (Access to the PDF Document is restricted pursuant to the E-Government Act. Access is limited to Counsel of Record and the Court.). (tcb) (Entered: 11/09/2012)
11/09/2012	75	CLERK'S JUDGMENT in favor of Plaintiffs Natasha Chittams, Lynn

DATE	NO.	DOCKET TEXT
		Taylor, James Davis, Alissa Cole, Sandra Hunt, Juan C. Willis, Stanley Richardson and Clarence Baldwin,Brittany Stribling, Joseph Mayfield, Sidney Banks, Owen Gail, Theodore Wesby, Anthony Hood and Ethelbert Louis and Gary Gordon against Officer Anthony Campanale, Officer Andre Parker and the District of Columbia. Signed by Judge Robert L. Wilkins on 11/9/2012. (tcb) (Entered: 11/09/2012)
11/26/2012	76	MOTION for Attorney Fees by CLARENCE BALDWIN, SIDNEY A. BANKS, JR, NATASHA CHITTAMS, ALISSA COLE, JAMES DAVIS, OWEN GAYLE, GARY GORDON, ANTHONY MAURICE HOOD, SHANJAH HUNT, ETHELBERT LOUIS, JOSEPH MAYFIELD, JR, STANLEY RICHARDSON, BRITTANY C. STRIBLING, LYNN WARWICK TAYLOR, THEODORE WESBY, JUAN C. WILLIS (Attachments: # 1 Exhibit 1-, # 2 Exhibit 2-, # 3 Exhibit 3-, # 4 Exhibit 4-, # 5 Exhibit 5-, # 6 Exhibit 6-)(Lattimer, Gregory) (Entered: 11/26/2012)
12/03/2012		MINUTE ORDER: The parties shall appear on January 28, 2013, at 10:00 A.M. in Courtroom 27A for a hearing on Plaintiffs' MOTION for Attorneys' Fees. Signed by Judge Robert

DATE	NO.	DOCKET TEXT
		L. Wilkins on 12/3/2012. (lcrlw3) (Entered: 12/03/2012)
12/03/2012		Set/Reset Hearings: Motion Hearing on Plaintiff's Motion for Attorneys' Fees set for 1/28/2013 10:00 AM in Courtroom 27A before Judge Robert L. Wilkins. (clv,) (Entered: 12/03/2012)
12/04/2012	77	Amended MOTION for Attorney Fees *and costs* by CLARENCE BALDWIN, SIDNEY A. BANKS, JR, NATASHA CHITTAMS, ALISSA COLE, JAMES DAVIS, OWEN GAYLE, GARY GORDON, ANTHONY MAURICE HOOD, SHANJAH HUNT, ETHELBERT LOUIS, JOSEPH MAYFIELD, JR, STANLEY RICHARDSON, BRITTANY C. STRIBLING, LYNN WARWICK TAYLOR, THEODORE WESBY, JUAN C. WILLIS (Attachments: # 1 Exhibit Lattimer's Calculation of Hours, # 2 Exhibit Berk's Calculation of Hours, # 3 Exhibit Lattimer's Affidavit, # 4 Exhibit Berk's Affidavit, # 5 Exhibit Laffey Matrix, # 6 Exhibit Bill of Costs) (Lattimer, Gregory) (Entered: 12/04/2012)
12/07/2012	78	NOTICE OF APPEAL TO DC CIRCUIT COURT re 39 , 40 & 75 by A. CAMPANALE, ANDRE PARKER, DISTRICT OF COLUMBIA. Fee

DATE	NO.	DOCKET TEXT
		Status: No Fee Paid. Parties have been notified. (Pittman, Jonathan) Modified on 12/10/2012 to add linkage (rdj). (Entered: 12/07/2012)
12/10/2012	79	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the fee was an Appeal by the Government re 78 Notice of Appeal to DC Circuit Court. (rdj) (Entered: 12/10/2012)

* * *

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

Docket No. 12-7127

THEODORE WESBY, ET AL,

v.

DC, ET AL,

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
12/13/2012	PRIVATE CIVIL CASE docketed. [12-7127]
12/13/2012	NOTICE OF APPEAL filed [1409897] by Anthony Campanale, DC and Andre Parker seeking review of a decision by the U.S. District Court in 1:09-cv-00501-RLW. Assigned USCA Case Number [12-7127]
	* * *
01/28/2013	MOTION filed [1417614] by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis for summary affirmance. (Response

DATE	DOCKET TEXT
	to Motion served by mail due on 02/11/2013) [Service Date: 01/28/2013 by CM/ECF NDA] Pages: 16-20. [12-7127] (Lattimer, Gregory)
01/30/2013	MOTION filed [1418099] by Anthony Campanale, DC and Andre Parker to extend time to file response to 03/04/2013. (Response to Motion served by mail due on 02/14/2013) [Service Date: 01/30/2013 by Email] Pages: 1-10. [12-7127] (Schifferle, Carl)
02/06/2013	TRANSCRIPT STATUS REPORT [1419089] by Anthony Campanale, DC and Andre Parker [Service Date: 02/06/2013]. Status of Transcripts: transcripts needed for the appeal have been ordered, but not all transcripts have been received. Next APPELLANT transcript status report due 03/08/2013. [12-7127] (Schifferle, Carl)
02/06/2013	CLERK'S ORDER filed [1419129] granting motion to extend time [1418099-2]; directing response to motion for summary affirmance [1417614-2] Response due on 03/04/2013 [12-7127]
02/27/2013	TRANSCRIPT STATUS REPORT [1422518] by Anthony Campanale, DC and Andre Parker [Service Date: 02/27/2013]. Status of Transcripts:

DATE	DOCKET TEXT
	Final - All transcripts needed for the appeal have been completed and received. [12-7127] (Schifferle, Carl)
02/27/2013	MOTION filed [1422724] by Anthony Campanale, DC and Andre Parker to extend time to file response to 03/11/2013. (Response to Motion served by mail due on 03/14/2013) [Service Date: 02/27/2013 by Email] Pages: 1-10. [12-7127] (Schifferle, Carl)
03/11/2013	MODIFIED EVENT FROM FILED TO LODGED—RESPONSE IN OPPOSITION LODGED [1424622] by Anthony Campanale, DC and Andre Parker to motion for summary affirmance [1417614-2] [Service Date: 03/11/2013 by Email] Pages: 16-20. [12-7127]]—[Edited 03/11/2013 by JMC] (Schifferle, Carl)
03/12/2013	CLERK'S ORDER filed [1424794] granting motion to extend time [1422724-2]; the Clerk is directed to file response [1424622-2] [12-7127]
03/12/2013	PER ABOVE ORDER lodged response [1424622-2] is filed [12-7127]
03/20/2013	REPLY FILED [1426472] by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield,

DATE	DOCKET TEXT
	Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis to response [Service Date: 03/20/2013 by CM/ECF NDA] Pages: 1-10. [12-7127] (Lattimer, Gregory)
04/15/2013	INCORRECT DOCKET ENTRY-DISREGARD—MOTION filed [1430863] by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis for summary affirmance. (Response to Motion served by mail due on 04/29/2013) [Service Date: 04/15/2013 by CM/ECF NDA] Pages: 1-10. [12-7127]—[Edited 04/16/2013 by JMC] (Lattimer, Gregory)
05/31/2013	PER CURIAM ORDER filed [1438825] denying motion for summary affirmance [1417614-2]. The Clerk is instructed to calendar this case for presentation to a merits panel. Before Judges: Henderson, Griffith and Kavanaugh. [12-7127]
06/10/2013	CLERK'S ORDER filed [1440417] setting briefing schedule: APPEL-

DATE	DOCKET TEXT
	LANT Brief due 07/30/2013. Appendix due 07/30/2013. APPELLEE Brief due on 08/29/2013. APPELLANT Reply Brief due 09/12/2013 [12-7127]
07/30/2013	APPELLANT BRIEF [1449330] filed by Anthony Campanale, DC and Andre Parker [Service Date: 07/30/2013] Length of Brief: 11,288 Words. [12-7127] (Schifferle, Carl)
07/30/2013	JOINT APPENDIX [1449331] filed [Volumes: 1] [Service Date: 07/30/2013] [12-7127] (Schifferle, Carl)
09/03/2013	APPELLEE BRIEF [1454456] filed by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor and Theodore Wesby [Service Date: 09/03/2013] Length of Brief: 12,450. [12-7127] (Lattimer, Gregory)
09/12/2013	APPELLANT REPLY BRIEF [1456292] filed by Anthony Campanale, DC and Andre Parker [Service Date: 09/12/2013] Length of Brief: 6, 502 Words. [12-7127] (Schifferle, Carl)
01/24/2014	CLERK'S ORDER filed [1476559] scheduling oral argument before Judges BROWN, PILLARD,

DATE	DOCKET TEXT
	EDWARDS Thursday, 03/27/2014 AM [12-7127]
03/12/2014	PER CURIAM ORDER filed [1483523] allocating oral argument time as follows: Appellants – 10 Minutes, Appellees – 10 Minutes. One counsel per side to argue; directing party to file Form 72 notice of arguing attorney - due 03/20/2014 [12-7127]
03/12/2014	FORM 72 submitted by arguing attorney, Gregory L. Lattimer, on behalf of Appellees Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Edwin Espinosa, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Faraz Khan, Ethelbert Louis, Joseph Mayfield, J. Newman, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis. [12-7127] (Lattimer, Gregory)
03/20/2014	FORM 72 submitted by arguing attorney, Carl J. Schifferle, on behalf of Appellants Anthony Campanale, DC and Andre Parker. [12-7127] (Schifferle, Carl)
03/27/2014	ORAL ARGUMENT HELD before Judges Brown, Pillard and Edwards. [12-7127]

DATE	DOCKET TEXT
05/28/2014	LETTER FILED [1494907] by Anthony Campanale, DC and Andre Parker pursuant to FRAP 28j advising of additional authorities [Service Date: 05/28/2014] [12-7127] (Schifferle, Carl)
06/02/2014	MODIFIED EVENT – LETTER FILED [1495726] filed by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis [Service Date: 06/02/2014] pursuant to FRAP 28j advising of additional authorities. [12-7127]—[Edited 06/03/2014 by JMC] (Lattimer, Gregory)
06/03/2014	CORRECTED LETTER FILED [1495853] by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, J. Newman, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis pursuant to FRAP 28j advising of additional authorities [Service Date:

DATE	DOCKET TEXT
	06/03/2014] [12-7127] (Lattimer, Gregory)
09/02/2014	PER CURIAM JUDGMENT filed [1510150] that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons in the accompanying opinion. Before Judges: Brown, Pillard and Edwards. [12-7127]
09/02/2014	OPINION filed [1510152] (Pages: 29) for the Court by Judge Pillard, DISSENTING OPINION (Pages: 12) by Judge Brown, [12-7127]
09/02/2014	CLERK'S ORDER filed [1510154] withholding issuance of the mandate. [12-7127]
09/15/2014	MOTION filed [1512353] by Anthony Campanale, DC and Andre Parker to extend time to file petition to 11/03/2014. (Response to Motion served by mail due on 09/29/2014) [Service Date: 09/15/2014 by Email] Pages: 1-10. [12-7127] (Schifferle, Carl)
09/16/2014	RESPONSE IN OPPOSITION FILED [1512559] by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, Stanley Richardson, Brittany C. Stribling, Lynn Warwick

DATE	DOCKET TEXT
	Taylor, Theodore Wesby and Juan C. Willis to motion to extend time [1512353-2] [Service Date: 09/16/2014 by CM/ECF NDA] Pages: 1-10. [12-7127] (Lattimer, Gregory)
09/16/2014	BILL OF COSTS FILED [1512561] by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, J. Newman, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis [Service Date: 09/16/2014] [12-7127] (Lattimer, Gregory)
09/19/2014	SUPPLEMENT [1513303] to motion to extend time [1512353-2] filed by Anthony Campanale, DC and Andre Parker [Service Date: 09/19/2014] [12-7127] (Schifferle, Carl)
09/23/2014	PER CURIAM ORDER filed [1513560] that the motion be granted [1512353]. Any petition for rehearing and/or rehearing en banc is now due on or before November 3, 2014. No further extensions of time will be granted. Before Judges: Brown, Pillard and Edwards. [12-7127]

DATE	DOCKET TEXT
11/03/2014	PETITION filed [1520453] by Appellants Anthony Campanale, DC and Andre Parker for rehearing en banc. [Service Date: 11/03/2014 by Email] Pages: 11-15. [12-7127] (Schifferle, Carl)
11/05/2014	CLERK'S ORDER filed [1520841] Upon consideration of appellants' petition for rehearing en banc, it is ORDERED, on the court's own motion, that, within 15 days of the date of this order, appellees Wesby, et al., file a response to the petition for rehearing en banc. The response may not exceed 15 pages. Absent further order of the court, the court will not accept a reply to the response. [12-7127]
11/13/2014	LETTER FILED [1522220] by Anthony Campanale, DC and Andre Parker pursuant to FRAP 28j advising of additional authorities [Service Date: 11/13/2014] [12-7127] (Schifferle, Carl)
11/20/2014	RESPONSE FILED [1523580] by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, J. Newman, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore

DATE	DOCKET TEXT
	Wesby and Juan C. Willis to petition for rehearing en banc [1520453-2] [Service Date: 11/20/2014 by CM/ECF NDA] Pages: 11-15. [12-7127] (Lattimer, Gregory)
01/28/2015	MOTION filed [1535596] by Antoinette Colbert to substitute party Antoinette Colbert for Ethelbert Louis (Response to Motion served by mail due on 02/12/2015) [Service Date: 01/28/2015 by US Mail] Pages: 1-10. [12-7127]
02/04/2015	CONSENT RESPONSE IN SUPPORT FILED [1535828] by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Ethelbert Louis, Joseph Mayfield, J. Newman, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis to motion to substitute party or change name [1535596-2] [Service Date: 02/04/2015 by CM/ECF NDA, Email] Pages: 1-10. [12-7127] (Lattimer, Gregory)
02/13/2015	CLERK'S ORDER filed [1537585] granting motion to substitute party or change name [1535596-2] Ethelbert Louis in 12-7127 substituted by Antoinette Colbert in 12-7127 [12-7127]

DATE	DOCKET TEXT
11/10/2015	LETTER [1583051] filed by Anthony Campanale, DC and Andre Parker pursuant to FRAP 28j advising of additional authorities [Service Date: 11/10/2015] [12-7127] (Schifferle, Carl)
11/13/2015	RESPONSE [1583637] filed by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Joseph Mayfield, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis to letter Rule 28j authorities [1583051-2], letter [1583051-3] [Service Date: 11/13/2015 by CM/ECF NDA] Pages: 1-10. [12-7127] (Lattimer, Gregory)
11/17/2015	AMENDED CERTIFICATE OF SERVICE [1583946] to response [1583637-2] filed by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Joseph Mayfield, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis. [12-7127] (Lattimer, Gregory)
02/08/2016	PER CURIAM ORDER, En Banc, [1597780] (IN SLIP OPINION

DATE	DOCKET TEXT
	FORMAT) filed denying petition for rehearing en banc [1520453-2] Before Judges: Garland, Henderson,** Rogers, Tatel, Brown,** Griffith, Kavanaugh,** Srinivasan, Millett, Pillard,** and Wilkins*. * Circuit Judge Wilkins did not participate in this matter. ** Circuit Judges Henderson, Brown, Griffith, and Kavanaugh would grant the petition for rehearing en banc. ** A statement by Circuit Judge Pillard and Senior Circuit Judge Edwards, concurring in the denial of rehearing en banc, is attached. Pursuant to Fed. R. App. P. 35(a), Senior Judge Edwards, a member of the merits panel, did not participate in the vote whether to grant rehearing en banc. ** A statement by Circuit Judge Kavanaugh, with whom Circuit Judges Henderson, Brown, and Griffith join, dissenting from the denial of rehearing en banc, is attached. [12-7127]
02/08/2016	Publishing Order [1597780-2] [12-7127]
02/16/2016	MOTION [1598870] filed by Anthony Campanale, DC and Andre Parker to stay mandate (Response to Motion served by mail due on 02/29/2016) [Service Date: 02/16/2016 by Email]

DATE	DOCKET TEXT
	Pages: 1-10. [12-7127] (Schifferle, Carl)
02/22/2016	RESPONSE IN OPPOSITION [1600174] filed by Clarence Baldwin, Sidney A. Banks, Natasha Chittams, Antoinette Colbert, Alissa Cole, James Davis, Owen Gayle, Gary Gordon, Anthony Maurice Hood, Shanjah Hunt, Joseph Mayfield, Stanley Richardson, Brittany C. Stribling, Lynn Warwick Taylor, Theodore Wesby and Juan C. Willis to motion to stay mandate [1598870-2] [Service Date: 02/22/2016 by CM/ECF NDA] Pages: 1-10. [12-7127] (Lattimer, Gregory)
02/25/2016	PER CURIAM ORDER [1600791] filed denying motion to stay mandate [1598870-2]. Before Judges: Brown*, Pillard and Edwards. * Circuit Judge Brown would grant the motion. [12-7127]
03/03/2016	PER CURIAM ORDER [1602148] filed granting appellees' bill of costs in the amout of $103.18 [1512561-2] [12-7127]
03/03/2016	MANDATE ISSUED to Clerk, District Court [12-7127]
04/18/2016	LETTER [1609679] received from the Clerk of the Supreme Court of the United States notifying this court that the time for filing a petition for

DATE	DOCKET TEXT
	writ of certiorari has been extended to: 06/08/2016. [12-7127]
06/13/2016	LETTER [1620571] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket on 06/08/2016 as No. 15-1485. [12-7127]
01/19/2017	LETTER [1656954] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in case No. 15-1485: The motion of International Municipal Lawyers Association, Inc. for leave to file a brief as amicus curiae is granted. The petition for writ of certiorari was granted on 01/19/2017. [12-7127]

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 09-501 (RWR)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Wednesday, March 31, 2010
Washington, D.C.

The deposition of SANJAH LEAH HUNT was called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice, in the Offices of Attorney General for the District of Columbia, 441 Fourth Street, Northwest, Washington, D.C., convened at 10:15 a.m. before Jonell Easton, a notary public, when were present on behalf of the parties:

* * *

[8] Q. 10:00 p.m. on the evening of March 15, is that correct?

A. Yes, sir.

Q. What was the purpose of you being there?

A. I was there to do a bachelor party.

Q. How were you informed, who informed or asked you to go to that address to do a bachelor party?

A. Ms. Tasha.

Q. Do you know her full name?

A. No, sir, I do not.

Q. Was Tasha there that evening?

A. Yes.

Q. Do you know an individual by the name of Peaches?

A. Yes, I do.

Q. Who is that?

A. That is the person's house was supposed to be.

Q. Who told you that was Peaches' house?

A. She did out of her own mouth.

[9] Q. Did you know Peaches prior to this evening?

A. I have seen her a couple of times, other than that I don't know her.

Q. Do you know where she lives?

A. No, I thought that was her address.

Q. Had you been to 115 Anacostia Road, N.W. prior to March 15, 2008?

A. One time before.

Q. When was that?

A. I couldn't honestly tell you because it was so long ago, but I can say about a month or so before then.

Q. Do you know the name of the bachelor?

A. No, sir, I do not.

Q. What was your understanding of what activities would be going on at 115 Anacostia Road?

A. We went there to do a bachelor party, so we was there to entertain.

Q. Did you entertain?

A. We didn't get started really.

* * *

[22] A. I told them it was Peaches, Peaches' house, she allowed us to be here.

Q. How long were you at – you were brought to Sixth District. Correct?

A. I believe that was Sixth District, yes.

Q. How long were you at Sixth District before you were released?

A. I was the last one to be released, I was in there at at least 18 hours.

Q. What time were you released?

A. In the afternoon about 3:00 or 4:00 in the afternoon, if not later.

Q. Do you know why you were there so long?

A. No, sir. I not.

Q. Did you ask anybody why?

A. They wouldn't give us any information, they were more laughing and joking at us

Q. At some point they changed the charge from unlawful entry to disorderly conduct. Do you know when?

A. They changed the charge about four, five [23] times.

Q. First it was unlawful entry?

A. Yes.

Q. What was the second charge?

A. Indecent exposure and they switched it to enter, I mean there without a lease or something of that nature and they changed it to disorderly conduct.

Q. When you say they, did someone tell you – some police officer?

A. Yeah, there was several police officers coming back – what are you here for, you shouldn't be here for this.

Q. Do you know what police officer told you that?

A. No, sir, I couldn't tell you, there was so many different ones coming to us, I couldn't honestly tell you.

Q. Under what conditions were you released?

A. I had to pay a fine.

Q. How much?

[24] A. I think it was $35.

Q. Did there come a time when the police actually let you leave the station and then they asked you to come back and they changed the charge – did that ever happen?

A. No.

Q. So I am clear the only conduct – the conduct that you described that you saw going on there was people standing around talking and drinking a beer?

A. Yes, and one girl was giving a lap dance and that is it.

Q. That is the only thing that you saw?

A. Yes.

Q. Were you aware there were pictures taken of women who had dollar bills in a garter belt?

A. Yes.

Q. Do you know how many women there were?

A. That I know of – it was at least two or three they took pictures with money in the garter belts.

[25] Q. Did you ever observe how the money got in the garter belts?

A. Most women – we don't leave money in our purse when we go off the floor, we put our money in the garter belts, so we can keep it so no one steals it, could have been a couple of them that had money, I don't know where the money came from

Q. Did you see any of the men hand the women money?

A. No.

Q. Did you see any of the men stick money in the garter belts?

A. No, sir.

Q. Were you paid for attending the bachelor party?

A. No, sir.

Q. When I say were you paid I mean by anybody, paid an entertainment fee or anything?

A. No, sir.

Q. Do you know an individual by the name of Damien Hughes?

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 09-501 (RWR)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Thursday, April 8, 2010
Washington, D.C.

Deposition of NATASHA NICOLE CHITTAMS

the plaintiff, called for examination by counsel for the defendants, pursuant to notice, held in the Office of the Attorney General, 441 Fourth Street, N.W., 6th Floor South, Washington, D.C. 20001, beginning at 2:21 p.m., before Kelly Susnowitz, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

* * *

[10] A. The night we got arrested.

Q. Do you know a woman by the name – that goes by the name of Peaches?

A. No.

Q. Did you ever hear that before?

A. No.

Q. Do you know a [redacted]?

A. Yes.

Q. Where do you know Mr. Taylor from?

A. He's my godbrother.

Q. He's your godbrother?

A. Yes.

Q. Tell me, how did he become your godbrother?

A. I mean, we just known each other for so many years and, you know, we were always together, so people thought we were sisters and brothers, so we be, like, yeah, we're sisters and brothers.

Q. Do you know or did you know a person by the name of Brittany Stribling?

A. I just know her as being my brother's [11] girlfriend.

Q. When you say your brother, you're talking about Mr. Taylor?

A. Yes.

Q. Do you know anything else about her?

A. She goes to Howard.

Q. Did she ever work for you?

A. No.

Q. Do you know if she ever worked at any strip club?

A. Not to my knowledge.

Q. Did Mr. Taylor ever tell you about a dancer that he had heard of by the name of Peaches?

A. No.

Q. At some point, Ms. Chittams, you ended up at 115 Anacostia Road in Northeast, Washington, on March 15th of 2008; is that correct?

A. Yes.

Q. Had you ever been there before?

A. One time.

[12] Q. Who did you go there with?

A. Tasty.

Q. When was that, prior to March?

A. It was, like, a week or two prior to that.

Q. Was there furniture in the house?

A. It was chairs and she had a bed and shower curtains and stuff. She said she just moved in, so it looked like people just moving in, just a bathroom set, a bed right now. There was food in the refrigerator.

Q. Did you ask or did Tasty tell you who owned that house?

A. No.

Q. Did you ask or did Tasty tell you that she was renting the house?

A. No. I assumed, because she had keys and she just walked into the house.

Q. How is it, that on March 15th, you came to be at 115 Anacostia Road?

A. Tasty said she knew a guy that was having a bachelor party and she needed some more girls to [13] come through, so I just called some girls and told them to come over to the residence.

Q. And the girls that you called, are these girls that you know?

A. I know from meeting at the club, yes.

Q. And so you had their phone numbers somewhere on you, either on your cell phone or –

A. At that moment, yes.

Q. When did you know that there was going to be this party at 115 Anacostia Road?

A. I knew, say, the party started like 10:00. I knew, like, a couple hours beforehand, so about 7:00 or 8:00 or so.

Q. Did you – were you doing events at that time?

A. Yes. I had just, like, really started getting into the adult entertainment part of it, so I was, you know, going to meet the girls and letting myself be known that this is what I do and stuff.

Q. Whatever experience you had, was it [14] unusual that you would get a call just a couple of hours before an event would take place?

A. No.

Q. The girls or the women that you called, how were they going to be paid for attending this – would you call this an event?

A. Yes, it's considered an event. They would work on tips, meaning, whatever the guys gave them for dancing, is what they made.

Q. Were they given, for example, a certain amount of money just to show up?

A. No.

Q. And did they have to pay you some kind of fee or did you charge them a certain percentage?

A. No.

Q. So any money that they made that night was their own money?

A. Correct.

Q. And it's also correct that you never promised to pay them anything just to show up?

A. No.

[15] Q. What time did you arrive?

A. I want to say maybe, like, 10:00.

Q. You got there at 10:00 and, when you got there, who was there?

A. We actually all, kind of, like, me and the girls and Tasty got there at the same time.

Q. Who were the girls that were with you?

A. I don't remember. It's been two years.

Exactly, which girls – I know Lexis was there. Lola with there. To be honest, I really can't, like, say the names off the top of my head of who was there.

Q. Do you know Lexi's full name or real name?

A. I don't know none of the dancers by their original names.

Q. And that would be the same for Lola?

A. Yes.

Q. When is the last time you saw Lexi?

A. Everybody, as far as girls, I have not seen none of them since we all got arrested.

Q. Is there any reason why that is?

[16] A. I don't know. I can't answer that.

Q. Have you seen Tasty since this event?

A. No.

Q. I'm going to show you a series of pictures, as I showed other individuals and, again, for the record, it is Exhibit 3, attached to the District's initial disclosure, and it contains 18 pictures and the first several pictures are of individuals. I would like for you to look at those pictures and tell me, who, if anybody, you recognize?

A. I remember her, but I don't remember her name.

Q. Again, the picture you're pointing to is the one that has the –

A. Three, eighteen pics.

Q. Has Defendant's Exhibit 3, with 18 pics on it?

A. Right. I don't remember her name, but she used to work at Irving's.

Q. Have you seen her since?

[17] A. No, I haven't seen any of the girls since.

Q. Before you go on, when you say, you don't remember her name, are you talking about her real name or her stage name?

A. I don't know her by her real name. I just know her – I mean, I don't remember her stage name. I just know her face. I don't remember her stage name or her biological name. I can't see her face, so I don't know. I remember him.

Q. Do you know him?

A. I know him by a nickname.

Q. What's his nickname?

A. Porn Star.

Q. Where does he get the name Porn Star from?

A. I mean, that's what he had tattooed on his hand, so.

Q. Do you know him from any of the clubs that you –

A. I actually know him – I'm not sure if he owns it or runs it, he runs a car lot.

Q. Do you know if this individual is one of

* * *

[26] Q. At some point, did other people come upstairs?

A. They had to, for the bathroom, because it was only one bathroom, so you had to come up the steps to go to the bathroom.

Q. Did anybody, who came up the steps, go into the room where you were at?

A. Just the girls.

Q. Were any of the men, with you that night, upstairs?

A. Well, not too later, but like, Louis came upstairs and James was upstairs in the bathroom.

Q. James' last name is what?

A. I don't know.

Q. And who is Louis?

A. The guy that just left here.

Q. You don't know his first name?

A. I just know, Louis.

Q. Anybody else?

A. And Fuzzy, those were the men that were upstairs.

[27] Q. Other than the dancers, were any of the women upstairs with you?

A. Brittany was upstairs with me and, I think, it was Lexis who was upstairs with me, too.

Q. Was Lexis one of the dancers?

A. Yes.

Q. Now, when you were upstairs, do you recall there being a chair inside of a closet?

A. No.

Q. No?

A. I mean, the room I was in, you could see the closet. It's not a big closet. It's not even a walk-in closet, so I was only in one room.

Q. When you were upstairs, did you see any of the women giving any of the people upstairs a lap dance?

A. No. No men was allowed upstairs, unless they were using the bathroom.

Q. So when you said that Fuzzy and Louis and James were upstairs, they just came up to use the bathroom and went back downstairs?

[28] A. Well, James was in the bathroom and, yes, he would have walked back downstairs, and Louis was talking to Fuzzy, so. I mean, I knew they knew each other, so I didn't think, like, he would be, like, a problem sitting there talking to Fuzzy, so.

Q. At some point, did somebody order food?

A. Yes, I ordered food. I'm greedy.

Actually, me and the girls ordered food. There was a lot of carryout food, as I'd seen in your pictures, it was from the women.

Q. Did any of the men order food?

A. No, not that I can recall. I think that was just all the girls.

Q. Was the food that you ordered for everybody there or just for the girls?

A. No, that's what we ordered to eat. It was just for us.

Q. It was just for the girls?

A. Yes.

Q. What was Louis doing when he was upstairs?

[29] A. Standing in the hallway. I mean, this is, like, a very, very small nit place, so he was standing in the hallway talking.

Q. Did he have any of the food that you guys ordered?

A. No. By the time he got there, the food was already gone.

Q. Did he have his own food?

A. Not that I recall. I don't recall him having anything.

Q. Nothing that night?

A. No.

Q. Now, at some point, did you become aware that there were police in the house?

A. Not until they came up with their guns saying, get downstairs, get downstairs, but they took us down one at a time.

Q. Now, at the time that the police came upstairs or the time that you were aware that there were people coming upstairs, where was Fuzzy or Mr. Taylor?

[30] A. He was in one – the bedroom.

Q. Was that the same room that you were in?

A. No. It's like a room here, a room here and, like, the bathroom here. I was in this room. He was in this room.

Q. Do you know how long he had been in the room, that he was in, prior to you became aware that the police were coming upstairs?

A. No.

Q. Do you know how long he was not in the room, that you were in, prior to the police coming upstairs?

A. He was just in and out. Like I said, it was so small, you just want to walk around, so he was, like, basically, like, walking, so I mean, maybe a minute, two minutes.

Q. In the other room – let me show you these pictures again. Again, it's the same pictures I just showed you and I want you to take a look at the pictures of the different rooms and I want you to tell me which room, that you recognize, that [31] you were in, if any, shown in these pictures?

A. This is the kitchen.

Q. Uh-huh. That's the picture with the countertop and the food on the counter?

A. Yeah, I don't know. I guess this is the kitchen, too. That's the trash, so I'm assuming that's the kitchen. I think this looks like the living room.

Q. Okay.

A. This was the room I was in.

Q. Okay.

A. Yeah, because that was the chair I was sitting in, because I didn't want to sit on the floor. It looked dirty. This was the big room.

Q. The big room?

A. Because this room, I guess, is supposed to be the master. They're all little, I mean. This was – I wasn't in this room.

Q. Do you know if that was the room that Mr. Taylor was in?

A. Yes.

[32] Q. Let's have –

A. Because there is only two rooms and we was in this room, so.

MR. JACKSON: Let's have this picture marked as Chittams 1.

(Deposition Exhibit No. 1 was marked for identification.)

Q. So what has been marked as Exhibit 1 is a picture that you have stated, that you believe, that's the room that Mr. Taylor was in, and that's the time the police came upstairs?

A. Yes, that's the same room?

Q. The last picture here, that is Exhibit 1 –

A. I don't know what that is.

Q. Do you know which room that is?

A. No.

Q. So when the police came upstairs, what happens?

A. They was, like, come down, come down, with their guns, so Louis was standing right there.

[33] They brought him down first. Then they banged on the bathroom door and James was in there, so they were pushing, like, the door open, like, trying to get in. Like I said, me and Brittany and, I'm assuming, I think it was Lexi, was in the room. They brought everybody down one at a time and my brother, Fuzzy, was the last one they brought down.

Q. Did you hear the police say anything to Fuzzy?

A. No. I was already downstairs.

Q. You were already downstairs?

A. Yes.

Q. When you were downstairs, did you hear anything that sounded like a thump coming from the upstairs?

A. No. I mean, I could hear people walking. I mean, you know, there was no carpet on the floor, so I mean –

Q. It's a hardwood floor?

A. Yes. So there was no big – like,

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 09-571 (rmc)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Deposition of SERGEANT ANDRE SUBER
Washington, D.C.
Tuesday, April 6, 2010
1:57 P.M.

Job No.: 1-176947
Pages: 1-46
Reported by: Denice Z. Lombard, CSR

---

* * *

[11] I responded to the location.

Q All right. And that was because you were the official?

A Yes, sir.

Q So when you responded to the location, what happened?

A When I got to the house I observed all the subjects, along with the female, they were sitting on the floor.

Q Where?

A I believe in the living-room area.

Q Okay.

A And by the front door, living room area, leading around to the kitchen, and some were on the other side of the door leading around to the upstairs.

Q Now, how could you see these people? Were lights on?

A They had one or two lights on, yes.

Q So electricity was in the house.

A Yes.

Q All right. So then what happened?

A Then after I had them to debrief me as to what

* * *

[17] illegal, right?

A As far as what?

Q Anything.

A Them being there was illegal.

Q Well, you didn't – What information did you have that indicated that at that point?

A I asked them who's house this was.

Q What I'm asking you is before you get to that point, when you're being briefed by the officers, my question is, at that point you had no reason to believe that any illegal activity had taken place, right?

A In the course of their debriefing, one of the questions I asked that, who house, whose – what owner – is the owner on the scene of this particular establishment. They said no.

And I asked, "Well, who – is someone renting the house?" They said no. Then they began to tell me about some young laid who claimed to be renting the house. And she couldn't provide proof, and she wasn't on the scene at the location.

So after they told me that, they then added the other stuff in reference to people upstairs and [18] downstairs and all that kind of stuff, and then the question that I began to ask them again as to who gave them permission to be here.

Q Okay.

A And no one at that location could provide me a name or a number of the owner. They only gave a name of someone, I believe the name was Peaches. We called Peaches several times on the phone, a female. We asked her, "Who gave you permission to be inside this house?" She said no one.

She said she was possibly renting the house from the owner who was fixing the house up for her. And that she gave the people who were inside the place, told them they could have the bachelor party.

Q Okay.

A I asked her again who gave her permission to give them permission to come into an establishment or house that's not under her control. The she became evasive and hung up the phone.

Q Okay.

A I called her back. She again began yelling saying that she had permission – she didn't know the [19] owner's name, but she had permission to be inside the residence because she was going to rent the place out. Then she hung up again.

We had the detective, Detective Sepulveda, come to the scene, and he talked to her on the phone. And then through his conversation she stated that she didn't have permission to be inside the location.

At that time they all were there unlawfully.

Q So she told them that they could be there, right?

A Yes.

Q Okay. And then you all determined that she didn't have the right to tell them that they could be there, right?

A Yes, sir.

Q And then because she told them – gave them misinformation, you then arrested the people who thought they had a legal right to be there.

A If a person comes to a location, it's upon them, their responsibility, to find out if they can in fact be at a residence lawfully.

Q Okay. So let me understand this. If an

* * *

[24] he does as far as the investigative process, they have their own paperwork. But the officers completed their arrest paperwork once they got to the Sixth District.

Q What I'm asking is, did the detective put anything in writing regarding any of this?

A I have no idea what the detective did.

Q Did you put anything in writing regarding any of this?

A No, sir.

Q Why?

A Because it just wasn't my scene I was supervising the scene, and it's not my position to provide or to give – to write down any information. The officers that was there was writing all the information that was being provided to us.

Q But you were the person that authorized the arrest for unlawful entry, right?

A Yes, sir.

Q So do you say it wasn't your scene?

A That was my scene to supervise, but the officers, once they had control over the scene, then they called me. By that time they had gathered all the

* * *

[28] as of yet.

Q So that's what you heard her say.

A Yes, sir.

Q But you didn't write that down nowhere?

A No, sir.

Q And you don't know whether the detective wrote that down anywhere.

A No, sir.

Q So then why were these charges changed to disorderly conduct?

A Because Lieutenant Netter, who came on as the day watch commander, decided that because he was the watch commander, that he was not going to let 21 people sit in the cell, and that he was going to change the charges.

So he called the commander, and he called the inspector. They came down that Saturday morning, and then they all got together and they called the U.S. attorney general's office. They got together and said that we should have locked up one person, and then everyone else would have been able to leave.

I provided him with the D.C. code of the [29] unlawful entry statute. And he stated that he didn't care, and that he was going to release these people.

So I say, "You're the watch commander, I'm a sergeant, you have that authority and I don't." So then he said he was going to release them to detention journal.

So once the lieutenant got that process rolling, the commander Contee and Inspector Anderson, they came in, and they went up and they all got together, collaborated their facts, and they decided they were going to release everyone. So they then released everyone.

Then maybe about five, maybe 10 minutes later the Attorney General Office called – someone, a representative from the Attorney General office called and said, "Lock them up for disorderly conduct, loud voices."

I advised them that that statute does not fit this particular crime. However, Lieutenant Netter said he was the watch commander, I was a sergeant, that he was going to do it.

So by this moment, at this time they had [30] already released everyone, and they was getting their stuff at the front counter. So once they found out that they was going to lock them up for disorderly conduct, they got everybody back, brought them back to the cell, processed them for disorderly conduct, let them pay out, and that was it. I left and went home.

Q So let me understand this. Lieutenant Netter is the watch commander.

A He was the watch commander for day work, for the day work tour of duty.

Q This happened on what tour?

A On the midnight tour, which is the – the midnight tour starts the next day.

Q Right. After midnight.

A Yes.

Q So who would have been the watch commander?

A For the midnight tour it was Captain Mitchell.

Q All right. So was Captain Mitchell involved in this?

A She wasn't involved, because she had to respond to another location that she had to go out to. And I kept her abreast as to what was going on.

[31] Q Who was acting?

A Me.

Q So you were acting.

A Yes.

Q You were acting watch commander.

A Yes.

Q Okay. All right. So when you apprised Captain – you said Mitchell?

A Yes, sir.

Q What did she say?

A She was okay with my decision.

Q And then Lieutenant Netter came in at what time?

A I believe came in at 5 o'clock I believe. I'm not sure.

Q And so these people were still locked up.

A Yes, sir.

Q You were still on duty at that point?

A Yes, sir.

Q All right. So at that point – and I assume Captain Mitchell was still on duty at that point.

A She'd been relieved, and she already left.

[32] Q She left early?

A Well, once Lieutenant Netter assumes the watch commander position at that time for the day work tour, then she's released, she goes home.

Q I got it. All right. So Lieutenant Netter comes in, and I take it you and he had a conversation about this.

A Yes, sir.

Q All right. And he was of the opinion that all of those people shouldn't have been arrested.

A Yes, sir.

Q Only one.

A Yes.

Q The person who gave them permission to be there.

A He didn't say.

Q He didn't say.

A He didn't say as long as you locked up one person.

Q You disagreed with that.

A Yes, sir.

Q And you showed him the code.

* * *

[37] but the person who gave them permission didn't have legitimate permission to do what she did, then those people should be arrested for unlawful entry.

A Repeat the question?

Q Sure. The people who were there who believed that they had permission from Peaches should be arrested for unlawful entry if, in fact, Peaches did not have the right to give them permission?

MR. JACKSON: Objection.

You can answer the question.

THE WITNESS: Are you asking me – I'm trying to clarify.

MR. LATTIMER: Uh-huh. Go ahead. I told you if you don't understand my question try to clarify it, so go ahead and ask what you need to ask.

THE WITNESS: You're saying that Lieutenant Netter believed that –

BY MR. LATTIMER:

Q No, no, no, no. I'm asking you is this what you argued to Lieutenant Netter about these people being arrested is that just because Peaches gave them permission to be there, they should still be arrested [38] for unlawful entry, because Peaches herself did not have authority to give them permission?

A It was my belief that no one had permission to be inside that location, Peaches or anyone else, that everyone who was inside that location that were arrested was a lawful arrest.

Q Okay. And so what I'm trying to understand is why did you reach that conclusion when you knew that Peaches had given them permission to be there?

A Because Peaches didn't have permission to be there.

Q Okay. That's what I was asking. That's what I was trying to clarify. I think you just did. Is because Peaches herself did not have the authority to give anybody permission.

A And those people that were there did not have authority to be there.

Q Okay. Because they would have had the authority if Peaches had the right to give them permission, right?

A If Peaches had lawful right to the place and she wanted to throw her own party, then that's her [39] business. But Peaches did not have the right, nor did the people that were occupying that location have the right to be inside that location.

Q And it didn't matter whether or not they believed, based upon what Peaches told them, that they had the right to be there.

A Peaches nor the other individuals occupying that location did not have the right to be there.

Q All right. And that's what you told Lieutenant Netter?

A I advised Lieutenant Netter that Peaches, along with the other individuals inside that house, did not have permission nor the right to be there.

Q All right. And Lieutenant Netter disagreed with you.

A Yes, sir.

Q All right. And so therefore he decided to release everybody?

A Yes.

Q All right. So let me understand how that was going to work. Was he releasing everything on bond –

A No.

[40] Q – or was he just dropping the charge?

A When you – detention journal is that they're dropping the charges, mean that you're free to go.

Q Now, before that, because you told me that detention journal came later, when they were first going up, before there was a decision to charge them with disorderly conduct, how was that release going take place? What I'm asking is, was he releasing them on bond or was he just dropping the charges?

A When Lieutenant Netter decided to detention-journal them, Lieutenant Netter at that point was

dropping the charges against them, which means that it would show up that they had no record of being arrested for that particular day or for that offense.

Q All right. So how did the disorderly come about?

A I have no idea.

Q Well, I thought you said that you all got a call from the Attorney General's Office.

A Right.

Q Okay. Who had contacted – how did the Attorney General get involved in this?

[41] A Lieutenant Netter called Commander Contee and Inspector Anderson. And between those three, they called the Attorney General's Office, and between those four, they had a conversation of what they were going to do and how they was going to do it.

Q Okay. So as I understand it, the people were about to be released. Then a call comes in from the Attorney General's Office that says, "No, charge them with disorderly conduct," right?

A From what I was told, yes.

Q Okay. And then that's how the charge of disorderly conduct came about and they were allowed to post and forfeit, right?

A Yes, sir.

Q Now, did you have any conversation with anybody from the Attorney General's Office?

A No, sir.

Q Did you see anything that evening that substantiated the charge of disorderly conduct?

A No, sir.

Q Did you hear from any of the officers on the scene of anything occurring that justified the charge [42] of disorderly conduct?

A No, sir.

Q Did you have a conversation with anybody indicating that there was no basis for a charge of disorderly conduct?

A Elaborate on that a little bit.

Q What I'm asking you is, when you became aware that these people were going to be charged with disorderly conduct, did you have a conversation with anybody and say, "There's no basis for disorderly conduct"?

A Lieutenant Netter.

Q. Tell me how that happened.

A He advised me of what they was going to charge the individuals with.

Q And that was disorderly conduct?

A That was disorderly conduct.

Q Okay.

A And I advised him that that wasn't an appropriate charge.

Q Why?

A Because one, you can't be disorderly inside of [43] a house.

Q Okay.

A And in the disorderly statute for loud and boisterous, a crowd has to form, and/or people in a particular area that was quiet are waking up, which may be lights turning on and people coming out to see

what the commotion is all about. At this particular location that didn't fit that particular statute.

Q Okay. And you brought all of this to Lieutenant Netter's attention?

A Yes, sir.

Q And what or how did Lieutenant Netter respond to that?

A He's the watch commander.

Q That's what he said?

A "I'm the watch commander.".

Q And what, if anything, did you do?

A I walked out.

Q In your experience is it common that a watch commander will level charges that he knows has no legal basis?

MR. JACKSON: Objection; form of the question.

[44] Sergeant, you can still answer.

THE WITNESS: The watch commander has the authority that if he see a charge does not fit a crime to his or her opinion, that they can change that charge to whatever charge the believe will fit that particular crime.

BY MR. LATTIMER:

Q Okay. But what I'm asking is – you can't have disorderly conduct in a house, and you brought that to his attention. And so what I'm asking is, that was a charge that had no legal basis. And therefore, is it common for watch commanders to level charges in certain circumstances that they have no legal basis?

MR. JACKSON: Objection as to the form of the question.

You can answer.

THE WITNESS: It took the watch commander, the inspector, the district commander, and the representative from the Attorney General's Office to come up with that decision.

How they did it, I don't know. I wasn't involved or privy to the conversation or to the meeting

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 09-571 (rmc)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Deposition of OFFICER EDWIN ESPINOSA
Washington, D.C.
Tuesday, April 6, 2010
11:38 A.M.

Job No.: 1-176947
Pages: 1 - 23
Reported by: Denice Z. Lombard, CSR

---

* * *

[11] Q So is that what you were told, to stand by the door?

A Pretty much. I wasn't told that, but I wasn't going to get myself into anything I'm not sure of, so that was my role.

Well – okay. So did you observe any of the people who you say were on the living room floor engaged in any illegal activity?

A Obviously, besides just what I saw with the money and maybe open beer cans, that was it. That was all I saw.

Q Okay. But those aren't crimes are they?

A No, sir, no, they're not crimes.

Q So what I'm trying to understand is, when you walked in the door, did you see anybody engaged in any illegal conduct?

A No. Everybody was just hanging out inside, so no, anything illegal.

Q All right. So what happened next? After you stood by the door, what happened after that?

A I believe they asked if there was an owner to the apartment or to that residence, and that wasn't [12] answered. So I believe Officer Phifier and Jarboe tried determining within the listed location if anyone knew of or knew who would be the owner of the residence. And they came up with no answer. So, I mean, no one established residency there, so . . .

Q Okay. And then what?

A Say maybe a little while after, I believe they all got locked up for unlawful entry, sir.

Q Okay. Now who made the decision to arrest them for unlawful entry?

A I'm actually at the time not sure. I know it was definitely a boss, but I'm not sure who exactly made that determination.

Q Did you make the determination?

A Oh, no, sir. No, sir. No say in anything.

Q Now, you were the officer who signed some of the 163's; is that right?

A I believe I signed three of them, sir.

Q And why did you do that?

A Told to by my training officer, sir. Or assigned by my training officer.

Q Now, you didn't have – you had not seen

* * *

[21] did so because –

A I was instructed.

Q – you were told to do so.

A Yes, sir.

Q. You didn't conduct any investigation on your own, right?

A No, sir.

Q And as I recollect from your interrogatory answers, you didn't obtain any information –

A No, sir.

Q Let me finish the question – you didn't obtain any information from any other officers prior to signing the 163; is that correct?

A No, I believe not, sir.

Q Okay. Now, do you know why the charge was changed to disorderly conduct?

A Sir, I didn't even know it was changed until I believe the next day, so . . .

Q How did you find out the next day?

A I guess just maybe through other officers. I really can't recall how, but it might have been through other officers. Because I didn't make that decision, [22] so . . .

Q Now, while you were at the location, 115 Anacostia –

A Yes, sir.

Q – did you see anybody engaging in any conduct that you would find supports a charge of disorderly conduct?

A Not right off the top of my head, no, sir.

Q And I know I asked you about other people taking photographs. Did you take any photographs?

A No, sir. I didn't take anything.

MR. LATTIMER: All right. No further questions. Thank you, sir.

(Signature having been waived, the deposition of OFFICER EDWIN ESPINOSA was concluded at 11:57 a.m.)

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 09-571 (rmc)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Deposition of OFFICER ANTHONY CAMPANALE
Washington, D.C.
Tuesday, April 6, 2010
1:09 P.M.

Job No.: 1-176947
Pages: 1-45
Reported by: Denice Z. Lombard, CSR

---

* * *

[17] Q. How about that one?

A Don't recall.

Q Well, where would the light come from?

A My flash.

Q Your flash could do that?

A Yeah. It's a pretty powerful camera.

Q Okay. Now, that looks to be a thermostat to me. Was the heat on?

A Don't recall. It wasn't that cold out. We had long sleeves on. I wouldn't know if there was heat on or not.

Q And so you couldn't tell if the light was on there?

A No.

Q Okay. And what about this photograph where it shows the outside too?

A Doesn't appear to be any lights on in the outside.

Q Does there appear to be lights on in the inside?

A No.

Q No? So what you're saying is that this [18] photograph that shows the officers on the outside –

A Yes.

Q – this photograph was taken with a flash?

A The camera had a flash on, yes.

Q I didn't ask you that. I'm asking it was taken with the flash.

A Yes.

Q And it was dark in here and dark outside?

MR. JACKSON: Objection.

THE WITNESS: Yes.

BY MR. LATTIMER:

Q And there were no lights in the house; is that right?

A I didn't say that. I just said I don't recall.

Q So when the back door was open, did you have your flashlight on at that point?

A Yes.

Q So when you went in the house you had your flashlight on?

A Yes.

Q Did you ever turn it off?

[19] A Don't recall.

Q Why did you take pictures anyway?

A Document the scene.

Q What were you documenting?

A That's what we do – for individuals that get arrested, we documentate the scene.

Q What were you documenting is what I'm trying to understand.

A The probable cause for individuals not supposed to be there, documenting individuals – where they were at, placed in the house, things of that nature.

Q What is that probable cause of? This is a photograph that shows no faces and a woman's body with a garter belt. What is that probable cause of?

A That there was a strip club or some type of strip party going on.

Q And what is that probable cause of?

A Well, if it's unlawful to be there, then it's unlawful to have that.

Q Okay. But that has nothing to do with whether they're there legally or not does it?

[20] A Yes.

Q It does?

A Yes.

Q How does –

A It just documentates the scene of how things were that night, that's all, so there's a clear and accurate representation of how things were.

Q Okay. And I'm trying to understand what was the point?

A The point was that the individuals weren't supposed to be inside the residence.

Q Okay. And what was the point of taking this particular photograph?

A To show that there were strippers there being paid money to dance and other activities.

Q Is that illegal?

A To dance?

Q Yeah.

A Unlawfully inside of a house, anybody's unlawful to be there, yes.

Q Okay. What I'm asking you is, aside from whether or not you're there legally, if you're there

* * *

[33] A I believe she was naked when she was upstairs.

Q So who allowed her to put on clothes?

A Not sure. I didn't go upstairs.

Q So who told you that?

A I don't recall.

Q You didn't see it, right?

A That is correct.

Q So you don't know who told you.

A That's correct.

Q So you assume.

A No, I was told that.

Q You were told that.

Why wasn't she arrested for that?

A I don't know.

Q And so who was supposedly buying the sex?

A I don't know.

Q Who were you told was supposedly buying the sex?

A There were males upstairs. They didn't point them out to me.

Q So the female was pointed out but the males weren't.

[34] A Well, there was only one other female that came from upstairs. That was her (indicating). All the other females were downstairs.

Q Really.

A Yes.

Q Okay. Were all of the females dressed like strippers except for the one that had on the –

A Whatever the picture shows.

Q Let me finish – except for the one that had on the scrubs and the one that you say was selling sex?

A However the pictures were taken is how they were dressed that night.

Q Okay. All right.

So did you answer that? Did you arrest anybody?

A Yes.

Q Who?

A I don't recall.

Q You don't recall?

A I don't recall their names right now.

Q What did you arrest them for?

A Unlawful entry.

[35] Q And what was your basis for arresting somebody for unlawful entry?

A That they did not have permission to be inside the residence.

Q And how did you make that determination?

A Through investigation.

Q Okay. Tell me what you did.

A I was informed by Officer Parker who spoke to Peaches who allegedly had gotten permission from the owner, but could not identify the owner, nor could provide a name, nor could return to the scene. That information was relayed to me and also Sergeant Suber.

Through that investigation we believed we had probable cause to place the individuals under arrest for unlawful entry. Nobody could determine who was supposed to be inside the residence.

Q And what is your understanding of the charge – of the crime of unlawful entry? What entry, what do you believe has to be demonstrated in order for you to have probable cause?

A That you're present inside of a location that you do not have permission to be in.

Q And the person that you arrested, was it a male or a female?

[36] A I don't recall.

Q Did you have any conversation with that person?

A I'm sure at one point I did.

Q Now, you were asked about statements in your interrogatories, and you do not indicate that you took a statement from anybody that you recall; is that right?

A As far as a written statement?

Q Any statement: written, oral, whatever. You indicate that, "I don't recall which individuals I questioned."

A That's correct.

Q So the person you arrested, when did you talk to them?

A Like stated before in the beginning of the deposition, that went around the room, asked each individual –

Q I'm not asking you about that. I'm asking you about the person you arrested.

[37] A I asked everybody inside the room once everybody was inside the living room.

Q Okay. Now, that's all good, and that's nice. But my question is about the person you arrested.

A Is the person was present inside the living room, then I had talked to them, yes.

Q In your interrogatories you say you don't know who detained, handcuffed or arrested any of the plaintiffs on the night of the incident.

Does that indicate that you didn't arrest any of the plaintiffs in this case?

A No, it doesn't indicate that.

Q So which one of them did you arrest?

A Like I stated before, I don't recall their specific names at this time.

MR. LATTIMER: All right. Let's see if we can figure it out.

David, I don't have any arrest reports from this officer, although he says he arrested somebody. It's not in 1A through 1F or 2A through 2D.

MR. JACKSON: Well, you have everything that I have.

* * *

[40] are people in that house who are not in these pictures.

MR. JACKSON: I understand.

MR. LATTIMER: So if he took pictures of everybody, that means there are other pictures that we don't have. That's what I'm saying. He's not saying that he – he says he doesn't remember who the people are, and he doesn't know the names with the faces.

I'm not saying that. What he said though was that everybody in that house was photographed. And you

and I both know that everybody in that house is not in these pictures.

MR. JACKSON: Very simple.

Officer Campanale, other than the pictures that have been shown to you, do you recall taking any other additional pictures.

THE WITNESS: No, I do not.

BY MR. LATTIMER:

Q What did you do with your arrest reports?

A We turned them in.

Q To who?

A To the – well actually, they were turned in by officer – by MPO Phifier.

[41] Q So you gave your arrest reports to Phifier?

A That's correct.

Q Why?

A Because we were at check-off point, and they weren't letting us stay past our tour.

Q Now, why were the charges changed from unlawful entry to disorderly conduct?

A It's my understanding that Lieutenant Netter, who became the morning day watch, watch commander, ordered the charges be changed.

Q Why?

A I have no idea.

Q Did you ever ask him?

A No. That was done after we left.

Q All right. Now, with respect to any of the people in that house, did you see anybody engage in disorderly conduct?

A I didn't charge anybody with disorderly conduct.

Q I didn't ask you that. Did you see anybody engaged in disorderly conduct?

A Disorderly conduct can't be charged inside of [42] a residence. So no, I didn't see anybody engaged in disorderly conduct that would be charged in the District of Columbia.

Q Okay. So if disorderly conduct can't be charged inside of a residence, and all of these people were inside of a residence, how do you explain a charge of disorderly conduct being leveled against them?

A Because the day watch, watch commander, Lieutenant Netter, ordered that the charges be changed from unlawful entry to disorderly conduct.

Q And as far as you know, is there any basis to substantiate a charge of disorderly conduct?

A Not that I'm aware of.

Q Now, does your digital camera have a disk or does it use a – what kind of digital camera did you have?

A As far as what brand or –

Q Did it use a card or did it use a –

A Memory card?

Q Yeah.

A Yes.

Q Where is that memory card?

[43] A Probably still with the camera I imagine.

(Sergeant Suber enters.)

BY MR. LATTIMER:

Q How did you get the photographs off the memory card?

A I put them into an e-mail and submitted them.

Q You took the memory card and put it in a computer?

A Yes.

Q And then you emailed them.

A That's correct, and printed them out.

Q Did anybody else ever see what was on that memory card?

A No.

Q And where is that memory card now?

A I said I believe it's still with the camera.

Q Do you still have the camera?

A Yes.

Q Do you still use the camera?

A Yes.

MR. LATTIMER: No further questions. Thank you.

[44] MR. JACKSON: Would you want to waive the reading and signing or do you want to –

THE WITNESS: Yes, waive.

MR. JACKSON: He'll waive.

(Signature having been waived, the deposition of OFFICER ANTHONY CAMPANALE was concluded at 1:48 p.m.)

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 09-571 (rmc)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Deposition of OFFICER FARAZ KHAN
Washington, D.C.
Tuesday, April 6, 2010
11:13 A.M.

Job No.: 1-176947
Pages: 1-19
Reported by: Denice Z. Lombard, CSR

---

[12] Q Did you observe anyone engaged in any illegal conduct?

A No.

Q Did you find any drugs?

A I did not find any drugs, no.

Q All right. So then what happened? What happened next?

A Then we went to the station and started processing.

Q Started processing who?

A The individuals.

Q For what?

A For unlawful entry.

Q Okay. And why were you – were you involved in that?

A Yes. My name is on about six or seven 163's.

Q Why is that?

A Because when you're in training, your FTO, training officer, gives you the arrests. So Officer Jarboe gave me like, you know, you're putting your name on such and such people's arrests.

Q Okay. So what did he tell you you were [13] putting your name on the arrest for?

A For unlawful entry.

Q Okay. And what did he tell you constituted the unlawful entry?

A I don't know. Because MPO Phifier did the narrative for the unlawful entry.

Q So you were just signing your name, and you didn't know –

A I didn't have –

Q Let me finish the question.

You were just signing your name, and you didn't know what the basis of the arrest was that you were signing your name to?

A I mean, later on when I was there I found out that, you know, these people didn't have right to be in that house.

Q Okay. Well, what I'm asking you is, at the time that you were signing your name to these documents, am I understanding you correctly that you didn't know – you had no indication as to what the basis of the charge was?

A Yes, that's correct.

* * *

[15] A Can you repeat your question?

Q Sure. What I'm asking – well, let me ask it this way.

A Sure.

Q Prior to you signing your name on the 163 – and maybe I should start by asking you to explain what a 163 is.

A 163 is just the defendant's name, address, Social Security number, their description, along with the complainant's name and the arresting officer and the charge.

Q All right. So it's the charging document, correct?

A Yes.

Q All right. And so prior to signing the 163, what had Officer Jarboe told you regarding the charges that were being leveled against these individuals?

A Officer Jarboe told me that, you know, these individuals did not have permission, right to be in that house and they're going to be charged with unlawful entry.

Q He told you that before you signed.

[16] A Yes, before I signed.

Q Okay. And so what was the basis – what was the reason he told you that they didn't have permission to be in the house?

A I don't remember.

Q All right. Now, you know why those charges were changed?

A I don't know.

Q Did you see any of the individuals that you charged with unlawful entry engaging in disorderly conduct?

A No.

Q Did you see any actions on the part of any of the individuals that you charged with unlawful injury – I'm sorry, unlawful entry, did you see any of those people engaged in anything that would substantiate a charge of disorderly conduct?

A No.

Q Now, as I understand it, you didn't handcuff or transport any of the individuals from the house; is that right?

A Yes.

[17] Q Did you even know the people that you were charging? Did you know who the people that you were charging with unlawful injury – I'm sorry, I keep saying "injury"; it should be entry, unlawful entry. Did you know who they were?

A No.

Q And but for Officer Jarboe telling you that these people had no legal right to be there, did you have any other information that would substantiate a charge of unlawful entry?

A No.

Q Did you observe anything that led you to believe that anyone did not have the right to be there?

A No.

Q Did anyone attempt to flee when you entered the house?

A No.

Q Now, why were pictures of these people taken?

MR. JACKSON: Objection; foundation.

You can answer.

THE WITNESS: I don't know.

BY MR. LATTIMER:

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 09-571 (rmc)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Deposition of OFFICER JASON NEWMAN
Washington, D.C.
Tuesday, April 6, 2010
12:48 P.M.

Job No.: 1-176947
Pages: 1-28
Reported by Denice Z. Lombard, CSR

* * *

[12] Q Which one of those are unlawful?

A I didn't say it was unlawful. I'm just saying that's what I observed.

Q Okay. My question is did you observe anybody engaged in any unlawful conduct.

A No.

Q So you come in a house, you see no unlawful conduct, and you all order everybody downstairs.

A Yeah, so we can talk to everybody, yes.

Q So you all can talk to them.

A Um-hm.

Q About them not being engaged in unlawful conduct, correct?

A At this point we didn't know what we had

Q Okay. And then you go outside.

A Um-hm, out front.

Q For no obvious reason, right?

MR. JACKSON: Objection.

You can answer.

THE WITNESS: I was outside because there was a number of officers already inside. There was really no point for me to stay in there.

* * *

[15] showed up, and each individual was placed under arrest and taken to the 6D station.

Q Were they handcuffed?

A Yet, they wore.

Q Now, were they ever handcuffed and then the handcuffs were removed, and then handcuffed again?

A I don't remember that,

Q Were they metal cuffs or flexi cuffs or what?

A I think it was a little bit of both: flexi, metal.

Q Why was there a distinction?

A Honestly I really don't remember if there were metal, because I think metal cuffs and flex cuffs were used, because usually when you arrest that many people, flexi cuffs come out.

Q Do you know how many people were arrested?

A No, sir.

Q How many did you arrest?

A I had one person.

Q And who was that?

A I believe his name was Louis Echelberg [phonetic], something like that.

[16] Q Ethelbert Louis?

A Yes.

Q Okay. So why did you arrest him?

A He was an individual that I basically attached my name to with an arrest. There were a lot of people being arrested. So at this point you just, "This is your guy you're arresting; Officer, this is your guy you're arresting."

Q Okay. What does that mean?

A Basically what I said. You just – you arrest this person, next person is this officer's. Because there's so many people, one officer can't take all how many it was, so . . .

Q Now, I was of the impression that police officers needed probable cause to make an arrest.

A Well, at this point we believed we did.

Q Okay. So you had probable cause to arrest Mr. Ethelbert Louis?

A At this point we thought we did, yes.

Q Okay. So tell me what was your probable cause.

A We had probable cause to believe that they

* * *

[18] on that information and the investigation and then the sergeant's determination, we believed we had probable cause to arrest everyone for unlawful entry.

Q I'm not talking about we right now, and I'm not talking about everybody else. Right now I'm talking about you –

A Okay.

Q – and I'm talking about Mr. Ethelbert Louis.

A Okay.

Q Now, who talked to Mr. Ethelbert Louis?

A I don't remember if anyone talked to him specifically.

Q Okay. So if nobody talked to Mr. Louis – and you didn't talk to him, right?

A Not to the end, correct.

Q You didn't question him, right?

A He was questioned with the group.

Q You didn't question him, right?

A I did not.

Q All right. So if you had no information about whether or not Mr. Louis had the right to be there, what was your probable cause?

* * *

[20] Q And so what I'm trying to understand is what is your probable cause for having made that arrest?

A Based on the facts and circumstances where Mr. Louis was at that evening, I believed I did have probable cause to arrest him for unlawful entry.

Q But that doesn't answer my question. I understand you believe it. But what I'm asking you is what is it. When you're an officer and you know that facts are what you use to determine probable cause, correct?

A Correct.

Q All right. What are the facts that led you to believe that you had probable cause?

A The facts that led me to believe that was that no one knew who the owner was.

Q Not no one. I'm talking about Mr. Louis right now. Forget all the other people.

A All right. The individual did not know who the owner was.

Q Okay.

A He did not know where the owner was.

Q All right.

* * *

[24] was later changed to disorderly conduct?

A I have no idea.

Q Did you ask?

A No.

Q Did you ever see Mr. Ethelbert Louis engage in any conduct that would be considered disorderly conduct?

A No.

Q Did you ever see anybody engage in any conduct that you would consider disorderly conduct?

A No.

Q Did you see anything about any of the individuals that night that would justify a charge of disorderly conduct?

A Inside the house, other than what I saw, I guess not, no.

Q Did you ever tell anybody that you saw any individual engaged in conduct that night that could support a charge of disorderly conduct?

A No, sir.

Q Do you know who made a decision to charge these individuals, and specifically Mr. Louis, with

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 09-571 (rmc)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Deposition of OFFICER ANDRE C. PARKER
Washington, D.C.
Tuesday, April 6, 2010
10:39 A.M.

Job No.: 1-176947
Pages: 1-38
Reported by: Denice Z. Lombard, CSR

---

* * *

[9] someone came and opened the back door, and I came inside.

Q You say "someone." Was it an officer?

A It was an officer that made entry in the front, but I don't know which officer that knocked on the door in the front of the house.

Q So when you say "made entry," this was a forced entry?

A No, it wasn't forced entry. It was knocked, someone opened the door I assume, and – but it wasn't no forced entry.

Q So why did you go to the back?

A I went to the back because anytime we're investigating I guess the situation like that, it's for security purposes of if someone may run out the back. If there's something illegal going inside, someone may throw something out the window. So it's better to just surround the house and cover all exit points so we can stop and identify the parties inside.

MR. JACKSON: Could we go off the record? Can I have a word with Officer Parker?

(To Officer Khan.) And also you. Take two [10] seconds.

(Off the record.)

BY MR. LATTIMER:

Q So why did – when you went to that house, what was the basis of your presence? I mean, what information had you been provided prior to you getting there?

A Me personally I wasn't provided. He asked for assistance at the location, and the main issue was that there was some unlawful people inside of this home.

Q Had you been provided that information, that there was some unlawful people inside the home?

A There were – when I got there, I hadn't spoke to Jarboe or – Officer Jarboe or MPO Phifier directly. They just said, "Go around on back, you know, cover the door." So I went around and covered the door.

Buy during – once we got there inside, that was the determination.

Q So when you got there, you were told to go to the back. That's why you went to the back.

A Yeah.

Q You didn't know what was going on.

[11] A Well, I mean, there was a call. The call that came out was for a loud party at the location. And there had been like previous calls to that house that there were some I mean, I've heard officers have talked about that there was some a lot of partying going on at this particular location over course of time.

Q That's not illegal is it, partying at a house?

A No, not having parties, no.

Q Oh, okay. So that's what I'm trying to understand. The fact that you had received a call about a loud party, why would that suggest to you to go around to the back of the house?

A Well, the information was that the house was provided to – from what I understand from MPO Phifier was the house was due to be vacant. It was a vacant home. And no one had permission to be there.

Q When did Phifier tell you this?

A It was – he didn't tell me directly, but it was information that was brought to my attention once we got inside that, you know . . .

Q All right. Well, tight now I'm trying to [12] focus on – I assume you pulled up in a scout, right?

A Um-hm.

Q Is that yes?

A Yes,

Q Okay. And what I'm trying to understand from you right now is, when you pulled up in the scout, what did you know?

A I knew that there was people inside this home. They didn't have the right to be in that home.

Q All right. Tell me how you knew that at the time you pulled up.

A From the officers that were on the scene.

Q Okay. So they told you that these people didn't have a right to be there.

A Right.

Q Okay. Who told you that?

A I can't say it was – it may have been Jarboe, may have been Officer Jarboe had told me.

Q So you believe that Officer Jarboe told you that the people didn't have a right to be there.

A Right.

Q And did he tell you why he believed that?

[13] A We didn't go into detail at that moment, so we you know, later on when I got inside, that's when . . .

Q So you accepted what he said

A Yes.

Q And that's why you went around to cover the back.

A Yes.

Q To make sure that no one left or that no contraband was thrown into the yard.

A Right.

Q All right. Were you alone?

A I was partnered up with Officer Manaknoff.

Q Officer who?

A Officer Manakonff.

Q Do you know how to spell that?

A M-a-n-a-k-n-o-f-f.

Q All right. Anybody else?

A Not with me, no. It was just me and him.

Q All right. So you went around to the back.

A Yes.

Q And as I understand it, at some point shortly [14] after that someone – an officer came to the back door and let you in.

A Yes.

Q All right. And then you went in the house.

A Yes.

Q All right. And then what did you do at that point?

A I came in. There were people sitting downstairs. We just made everyone just keep their hands visible. I observed different individuals holding cups with liquid inside at that time.

Went upstairs to check the upstairs. I saw a bedroom that had some candles list, mattress. There were some females in there that had provocative clothing on with money in like I guess their garter belt on the leg.

I smelled marijuana in the air. There were some beer cans. So once I checked everything out, had everyone come downstairs into the living room area.

Q Did you find any marijuana?

A No.

Q But you smelled marijuana.

[15] A Yeah, like it was burned marijuana, correct.

Q Did you all search the house?

A Well, we looked around for anything that was openly visible, yes.

Q You didn't conduct a search?

A I mean, we checked the closets for like people and more individuals, because there was no furniture in the house. But far as like, you know, ripping floor boards or doing anything excessive, we didn't do that type of search, no.

Q So you didn't search for any drugs.

A I mean, I looked around for – I looked around for narcotics, yes, I did.

Q And you didn't find any.

A No.

Q All right. So after you came in, saw the people, went upstairs, then what did you do?

A I went back downstairs with the individuals. And I was speaking with the young lady – I don't know her name, hut she was dressed with like a work outfit on, like scrubs or something.

And she told me that her friend Peaches had [16] allowed her – Peaches was throwing this party. And Peaches – I said, "Well, where is Peaches?"

She said, "She's not here."

I said, "Well, you need to get her on the phone, because we need her to come back here so we can clear up what's – you know, if she can bring a lease or something was going on for this house."

Q Why is that?

A Why is what?

Q Why is it that someone needs to show you a lease?

A To show some type of ownership of the property.

Q Okay. So let me understand. Now, you didn't know who owned the property.

A No.

Q And so you go into a house, and once you get inside the house, you all decided that somebody needed to tell you who owned the house.

A Yeah, to find out who the owner is, yes.

Q Why?

A Because there's – I mean, there's a whole [17] bunch of people in the house. We smell narcotics, okay? That's more than enough reason to find out why these individuals – what's going on in here and the activities that was going on.

Q Okay. But what activities had you observed that were illegal?

A Well, I didn't observe anything that – in action that was illegal, but there was – from the information that was provided, that this house was being used unlawfully.

Q Who gave you that information?

A Well, that's what came from the call taker, whoever placed the call, and it was passed on to the officers.

Q Okay. So tell me what is it that you learned that was going on that was illegal in this house.

A That these individuals that were in the house did not have a lawful right to be in there by the owner of the property.

Q Okay. And who had spoken to the owner and obtained that information?

A I spoke to the owner, the grandson's – the [18] decedent's grandson who said he owned the property and that he was going to work out a – he was in the process of working out some type of lease agreement with this Peaches who would not return to the house that night. And he said he was trying to work something out with her, but they never came to agreement, and they did not have permission to be in the house.

Q And when did you speak to him?

A That night on the cell phone.

Q What was his name?

A I believe his name was Hughes.

Q And you spoke with – was this a man or a woman?

A It was a man.

Q – a Mr. Hughes, and Mr. Hughes told you that nobody had permission to be in the house.

A Right.

Q And then what?

A At that point I passed that information on to Sergeant Suber, and Detective Sepulveda was there, and they – he eventually made the decision to have [19] everyone placed under arrest.

Q Okay. So you spoke with somebody named Peaches, right?

A Yep.

Q Who told you she had a right to be there.

A Right.

Q And you spoke with somebody named Hughes, right?

A Right.

Q Who told you they didn't have a right to be there.

A Right.

Q And so then you all decided to arrest everybody in the house.

A I didn't decide. Sergeant Suber decided to make that –

Q Somebody decided to arrest everybody in the house.

A Yes.

Q Because one person said they didn't have the right, and one person said they did have the right.

A That's correct.

[20] Q And you had no other information at all; is that right?

A From my understanding, that's what I was told, yes.

Q And you had no – had not observed anybody in that house engaged in any illegal conduct at all, correct?

A Correct.

Q All right. Now, who, if anyone, did you arrest?

A I did not place anyone under arrest. I didn't fill out any paperwork. I don't have one of the arrests.

Q So you filled out no paperwork.

A To my knowledge, no.

Q So you didn't provide any of the information that you obtained from either Peaches or this Mr. Hughes in any police report; is that right?

A I provided to the officers that took arrest.

Q My question is –

A I didn't, no.

Q You didn't put in a 163, correct?

* * *

[31] elements of offenses how often?

A We go through professional-development training, but, I mean, once you leave the academy, I mean, it's kind of up to you to stay on top of the new laws and things that change or any of the offenses changes.

Q Right. And do you do that?

A I try to often, yeah.

Q So would it be fair to say that as you sit here today, and back when you were at that house in March of 2008, that you were familiar with the law regarding unlawful entry?

A Yes.

Q And you made a determination based upon what occurred and the information that was – you were aware of, that the offense of unlawful entry was a – you had probable cause – there was probable cause for that offense?

A Well, I didn't make the determination, but the individuals were in the home, and it was determined, based on the information from the owner of the property, they didn't have permission to be on their [32] property.

And the fact that Peaches wouldn't return – Peaches never came back to the house. She was reluctant to come back. So therefore that's what constitutes an unlawful entry.

But like I said, I didn't make that decision.

Q So why was nobody – why was all the charges changed once they got to the station?

MR. JACKSON: Objection; foundation.

THE WITNESS: I have no idea. That was way done after I left for the night by Lieutenant – the day work watch commander, Lieutenant Netter.

BY MR. LATTIMER:

Q So you know that the charges were changed, right?

A I found out the next – later on in the day when I was on my way to work.

Q And was changed to disorderly conduct, right?

A Yes.

Q Did you see anybody engaged in disorderly conduct?

A You can't be disorderly in the house. I

* * *

[34] for loud noise from the home, so . . .

Q So my question is, based upon what you observed while on the scene – and I can only ask you about you – did you see anything that would justify the charge of disorderly conduct?

A No.

MR. LATTIMER: I have no further questions. Thank you, sir.

MR. JACKSON: Let me just, for the record, remember we talked about the reading and signing of the deposition, or you can just waive that?

In other words, what you will be doing is making sure that everything that you said is accurate; not in terms of the substance of what you said, but just in terms of spelling and corrections and things like that.

Or you can just waive that process and then you're just going to rely on the court reporter's accuracy.

THE WITNESS: I'll sign it. I mean – I'll just take your word for it, I mean –

MR. JACKSON: What do you mean? You're going

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/01/11]

No. 09-cv-00501 (RLW)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

DISTRICT DEFENDANTS RESPONSES TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Many of the assertions in Plaintiffs' Statement of Material Facts are not facts at all, but are legal contentions that go to the ultimate issues in the above-captioned action.

1. Plaintiffs' Statement of Material Facts ("Pltfs' Statement") at 1. Plaintiffs contend that "[n]o basis exists for the charge of disorderly conduct. Espinosa dep at 11, 22; Campanale dep at 41-42; Khan dep at 12, 16; Newman dep at 12, 24; Parker dep at 17, 20, 32, 34; Suber dep at 28-30, 39-43." Defendants admit that the deposed MPD Officers made the statement; however, none of the Defendant MPD Officers charged or arrested Plaintiffs for disorderly conduct. It was the

D.C Office of the Attorney General that used its discretion to charge Plaintiffs with disorderly conduct.[1] This statement is not material to Count I, Fourth Amendment claim, or Count II for false arrest since the defendant MPD Officers onsite agree that disorderly conduct charges were inappropriate. See arrest report attached to District Defendants' Motion for Summary Judgment at Exhibit "A." Lastly, to the extent that District Defendants had no "lawful basis" for charging Plaintiffs for disorderly conduct, this is not a statement of facts, but argument.

2. Pltfs' Statement at 2. Plaintiffs contend that "[n]o one ever determined who was the owner of the property in question. Suber dep at 17-19." Actually it was established that none of the Plaintiffs were determined to be owners of the property in question because each of them admitted that they were social guests. In any event, this statement is not material. The issue of whether District Defendants are liable under the Fourth Amendment and common law false arrest is whether MPD Officers reasonably believed that Plaintiffs were not the owners and did not have a possessory interest in the property. All Plaintiffs admitted that they had no such possessory or ownership interest, and in fact, their arrest records show that each Plaintiff gave a residential address that was not the premises at which they were located. Additionally this Statement at 2 is false because MPD Officers asked Peaches, who allegedly invited Plaintiffs to the premises, how to contact the owner and she did. Upon contacting the owner, MPD Officers were told that no one was permitted on the premises and that Peaches

---

[1] *Wynn v. United States*, 38 A.2d 665, 699 n.1 (D.C. 1978) (bringing of new or additional charges is considered ordinarily to be a matter of prosecutorial discretion.

(Tasty) did not yet have a leasehold interest. DOC 25-9 (Deposition of Officer Andre Parker 17:11-22).

3. Pltfs' Statement at 3. Plaintiffs' contend that "[i]t was determined at the police station by the watch commander, that the plaintiffs' arrest was unwarranted. Suber dep at 28, 29, 39-41." Defendants do not deny that the watch commander may have held or held an opinion about the applicability of a charge but there was not an agreement by Defendant MPD Officers onsite. DOC 25-6 (Deposition of Officer Anthony Campanale 41:6-22). District Defendants do not challenge Plaintiffs' contention that the opinions of different MPD Officers may exist. This statement supports District Defendants' assertion of qualified immunity on the constitutional claim because, as a matter of law "[i]f it would have been possible for officers of reasonable competence to have disagreed about whether the arrest was justified, the arrest is immunized.[2]

4. Pltfs' Statement at 4. Plaintiffs contention that "[n]o probable cause existed for the arrest of the plaintiffs on the charge of unlawful entry in any event. Suber dep at 17-19" is not a statement of facts, but arguments that go to the ultimate issue in this case. Additionally this is not a statement of facts, but argument.

5. Pltfs' Statement at 5. Plaintiffs contend that "[t]he plaintiffs had permission to be at that location from the person that they had reason to believe resided at that location. Hunt dep at 8-9; Chittams dep at 11-12." Evidence obtained by the MPD Officers at the scene showed that plaintiffs' did not have permission. DOC 25-4 (Deposition Sgt. Suber 19:4-7) ("We had the

---

[2] *See Coons v. Casabella*, 284 F.3d 437, 440-41 (2d Cir. 2002); *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995).

detective, Detective Sepulveda come to the scene and he talke to [Peaches/tasty] on the phone. And then through his conversation she stated that she didn't have permission to be inside the location. In any event, Plaintiffs' state of mind is not material to the issues in this civil action.

6. Pltfs' Statement at 6. Plaintiffs contend that "[t]he District's supervisory personnel, which included a representative of the Office of the Attorney General, orchestrated the false arrest of the plaintiffs on the contrived charge of disorderly conduct. Suber dep at 29, 40-41." District Defendants admit only that the charge of unlawful entry was changed to disorderly conduct. While the Office of the Attorney General charged Plaintiffs with disorderly conduct, this contention is immaterial. The Attorney General's executive decisionmaking regarding prosecutorial charges is discretionary and generally not subject to review under the separation of powers doctrine.[3]

7. Pltfs' Statement at 7. Plaintiffs contend that "Sgt. Suber authorized the arrests of the plaintiffs for unlawful entry because he is of the opinion that if a person goes to a residence, "it's upon them, their responsibility, to find out if they can in fact be at that residence lawfully." Suber dep at 19." Defendants admit that the statement was made; however, many of the defendant MPD Officers had reason to believe that the Plaintiffs were unlawfully on the premises. DOC 25-6 (Deposition of Officer Anthony Campanale 35:17-22). This statement supports District Defendants'

---

[3] See *Baker v. United States*, 291 A.2d 208, 215 (D.C. 2006) (prosecutorial discretion rarely subject to judicial review under the separations of powers doctrine.)

assertion of qualified immunity on the constitutional claim.[4]

8. Pltfs' Statement at 8. Plaintiffs contend that "Defendant Newman arrested plaintiff Ethelbert Louis for unlawful entry because no one knew who the owner was. Newman dep at 15, 20." District Defendants admit only that the arrest was because MPD Officers knew that Ethelbert Louis was not the owner and had no possessory interest in the property because he and the other Plaintiffs admitted that they were on site as social guests. DOC 25-5 (Deposition of Edwin Espinosa 11:21; 12:1-5; DOC 25-4 (Deposition of Sgt. Suber 18:1-22). The statement is false to the extent that Plaintiffs contend that "no one knew who the owner was because MPD Officers asked Peaches, who alleged invited Plaintiffs to the premises, how to contact the owner and she did. Upon contacting the owner and Peaches, MPD Officers were told that no one was permitted on the premises and that Peaches (Tasty) did not yet have a leasehold interest. DOC 25-4 (Deposition of Sgt. Suber 19:4-7).

9. Pltfs' Statement at 9. Plaintiff contends that "Defendant Khan's name appears on about 6 or 7 163's and at the time he signed the documents, he had no indication as to the basis of the charges. Khan dep at 12-13." District Defendants do not deny this contention, but deny its materiality to the claims. The contention is not material because under the collective or imputed knowledge doctrine, an arrest or search is permissible where the actual arresting or searching

---

[4] *See Coons v. Casabella*, 284 F.3d 437, 440-41 (2d Cir. 2002); *Gibson v. Rich*, 44 F.3d 274, 27 (5th Cir. 1995) (as a matter of law "[i]f it would have been possible for officers of reasonable competence to have disagreed about whether the arrest was justified, the arrest is immunized.")

officer lacks the specific information to form the basis for probable cause or reasonable suspicion but sufficient information to justify a stop or search was known by other law enforcement officials initiating or involved with the investigation.[5]

10. Pltfs' Statement at 10. Plaintiffs contend that "Defendant Campanale arrested on (sic) person but he does not remember who it was but the arrest came about because the owner could not be identified. Campanale dep at 34-35." District Defendants admit only that MPD Officers knew that none of the Plaintiffs were the owner or had possessory interests in the property because Plaintiffs admitted that they were on site as social guests for a bachelor party.

11. Pltfs' Statement at 11. Plaintiffs contend that "Defendant Espinosa signed three 163's because he was told to do so. Espinosa dep at12." District Defendants do not deny this contention, but deny its materiality to the claims. The contention is not material because under the collective or imputed knowledge doctrine, an arrest or search is permissible where the actual arresting or searching officer lacks the specific information to form the basis for probable cause or reasonable suspicion but sufficient information to justify a stop or search was known by other law enforcement officials initiating or involved with the investigation.[6]

12. Pltfs' Statement at 12. Plaintiffs contend that "Defendant Espinosa did not obtain any information from any other officer before he signed the 163's."

---

[5] See *United States v. Hensley*, 469 U.S. 221(1985), *United States v. Canieso*, 470 F.2d 1224, 1230 n.7 (2d Cir. 1972).

[6] See *United States v. Hensley*, 469 U.S. 221(1985), *United States v. Canieso*, 470 F.2d 1224, 1230 n.7 (2d Cir. 1972).

District Defendants do not deny this contention, but deny its materiality to the claims. The contention is not material because Federal courts have granted qualified immunity to police officers in cases where the officer was listed as the arresting officer, but there was little or no evidence that the officer had either made the arrest or otherwise violated the plaintiff's constitutional rights.[7]

Respectfully submitted,

IRVIN B. NATHAN
Acting Attorney General

GEORGE C. VALENTINE
Deputy Attorney General,
Civil Litigation Division

/s/ William B. Jaffe
William B. Jaffe [502399]
Chief, General Litigation III,
Civil Litigation Division

/s/ Denise J. Baker
DENISE J. BAKER [493414]
Assistant Attorney General
441 Fourth Street, N.W., 6th Floor
Washington, D.C. 20001
(202) 724-7334 (telephone)
(202) 741-8800 (fax)
E-mail: Denise.baker@dc.gov

Counsel for the Defendants

---

[7] *See Fernandors v. District of Columbia*, 382 F. Stipp. 2d 63, 72-73 (D.D.C. 2005); *Bennett v. Schroeder*, 99 Fed. Appx. 707, 713-14 (6th Cir. filed May 27, 2004); *see also Montiel v. City of Los Angeles*, 2 F.3d 335, 343 (9th Cir. 1993).

METROPOLITAN POLICE DEPARTMENT
Washington, D. C.

ARREST/PROSECUTION REPORT
D. 163 Rev. 5/2002 G.O. 401.5

1. PERSON NOTIFIED OF NAME CHANGE – UNIT – DATE/TIME – NOIC NO. (ID ONLY)			2. ID NUMBER (ID ONLY) 609650
3. DEFENDANT'S TRUE NAME – LAST, FIRST, MIDDLE (ID ONLY)			4. CID NUMBER
UNIT ARREST NO. 06080385	6. DEFENDANT'S NAME – LAST, FIRST, MIDDLE (At time of arrest) [redacted]		7. DEA LAB NUMBER
Arresting Officer's Name: BONDS,COREY	9. TYPE OF RELEASE ☐ CITATION ☐ BOND ☐ COLLATERAL	10. NICKNAME / ALIAS: NONE	11. PHONE NUMBER: N/A
Unit: FC Badge #: 3961 Agency: MPD	12. COURT DATE: 3-15-08	13. ADDRESS (Include Room / Apt. No., City & State If Outside D.C.) [redacted]	14. TIME IN D.C.: N/A

☐ CHILD ABUSE ☐ GANG ☐ HATE SPECIAL INTELLIGENCE ☐ SENIOR CITIZEN ☐ DOMESTIC VIOLENCE

16. SEX	17. RACE	18. BIRTHDATE	19. SOCIAL SECURITY NUMBER
Male	Black	[redacted]	[redacted]

20. NEED INTERPRETER	21. HEIGHT	22. WEIGHT	23. HAIR	24. EYES	25. COMPLEX	26. PERMIT NO/ST	27. BIRTHPLACE (City & State)
☐ YES ☒ NO	5'9	188	BLK	BRO	Med	NONE	BOWIE ,MD

28. CO-DEFENDANTS: Number 4 (If more than 3, list on back)	29. IMPERSONATOR? ☐ M ☐ F ☒ NO	30. ETHNICITY	31. CAUTION
NAME, ADDRESS, ZIP CODE AND PHONE NUMBER: See. Narrative	32. SCARS/MARKS/TATTOOS: NONE	african american	none

33. HAT	34. JACKET	35. PANTS
NONE	NONE	BLUE

36. COAT	37. SHIRT	38. SKIRT/DRESS
NONE	WHT	NONE

39. WALES/NCIC CHECK

CHECK MADE BY (Name)	NCIC NUMBER	WARRANT ON FILE (If Yes, enter Warrant Numbers)
ABRON		Yes ☐ No ☒

LOCATION OF OFFENSE (Exact Address, include Room / Apt No.)	DATE OF OFFENSE	TIME OF OFFENSE
115 ANACOCOSTIA AVE NE	3-15-08	0130
LOCATION OF ARREST (Exact Address, include Room / Apt No.)	**DATE OF ARREST**	**TIME OF ARREST**
	3-15-08	0200HRS

ASSISTING OFFICER'S NAME, RANK, BADGE NO. & UNIT OR AGENCY	ASSISTING OFFICER'S NAME, RANK, BADGE NO. & UNIT OR AGENCY
BONDS,C. OFC. 3961. MPD	NEWMAN,J. OFC. 2174 MPD

43. DEFENDANT ADVISED OF RIGHTS

DATE	TIME	LOCATION	OFFICER'S NAME – ADVISING / COMPLETING PD FORM 47/47A	BADGE NO.	UNIT
		NOT ADVISED			

44. COMPLAINANTS / WITNESSES (If sworn member – Name, Rank, Badge No. and Unit) MORE ☐ See Back

	NAME – LAST, FIRST, M.I.	ADDRESS – STREET, CITY, STATE, ZIP CODE	BIRTHDATE	HOME PHONE NO.	WORK PHONE NO.
1	Foster, [redacted]	[redacted]	[redacted]	[redacted]	
2	Keck, [redacted]	[redacted]	[redacted]	[redacted]	

45. SPEC. OPS	46. TACTICS	47. PREMISES	48. SCHOOL ZONE / PUBLIC HOUSING
ONE	14 - Other tactic	6 - House	☐ ☐

CHARGES	NOI OR WARRANT NUMBER	CCN	MPD DISPOS.	COLLA/BOND RECEIPT NO
1. UNLAWFUL ENTRY		034-506	Lock up	676270
2. Disorderly Conduct		034 516		
3.			750	
4.				
5.				

50. PROPERTY RECOVERY / ITEMS OF EVIDENCE

PROPERTY BOOK/ PAGE NO	CSES NO
74/228	PRISONERS

51. INITALS – DATE – UNIT OF PERSON TAKING PRINT

52. M.O. WEAPONS, HANGOUTS, HABITS, INSTRUMENTS

53. RIGHT THUMB PRINT

[redacted]

CCB USE ONLY	HEIGHT	WEIGHT	HAIR	EYES	COMPLEX	SCARS/MARKS/TATTOOS

DISTRIBUTION: Page 1 to ID & R. Page 2 & 3 to Prosecutor, Page 4, Unit Copy, Page 5 Officer's Copy

COMPLETE ALL REQUIRED FIELDS AND MAKE FIVE COPIES FRONT TO BACK

55. EMPLOYMENT HISTORY (List present employment if any, on Line 1)

FROM - DATE - TO	EMPLOYER	ADDRESS	BUS. PHONE	OCCUPATION
1 Present	NONE			
2				

56. NAMES OF LIVING FAMILY, RELATIVES, FRIENDS AND ASSOCIATES (Begin with immediate family)

RELATIONSHIP	DOB/AGE	NAME - LAST, FIRST, M.I.	ADDRESS - STREET, CITY, STATE, ZIP CODE	PHONE NUMBER
		NONE		

57. MILITARY SERVICE BRANCH/DATE FROM - TO	58. TELEPHONE CALL MADE	59. PHONE NUMBER
N/A	☐ YES ☒ NO ☐ REFUSED	N/A

60. STATEMENT OF FACTS: (Give a brief statement in your own words, of the facts surrounding the offense and the arrest. Use Continuation Form PD 252A for additional space. Note present condition of any injured person(s). Do not give Witnesses' Names or Addresses. Refer to them as W1 or W2, etc as indicated in Item 31.)

The event occurred on 3-15-08 at approximately ~~at 115 ANACOCOSTIA AVE NE in Washington DC~~
The event occurred on 3-15-08 at approximately 0130 at 115 Anacostia Ave. NE in Washington DC.

Uniform members of the Meropolitan Police Department responded to 115 Anacostia Avenue Northeast, Washington, DC to investigate a compaint of Illegal activiites which generated from inside of the event location.
The information came from a former ANC commissioner, W-1. W-1 also stated, the listed property has been vacant for several months.

Uniformed members of the Metropolitan Police Department arrived on the scene. Master Patrol Officer Gregory Phifer and Officer Edwin Espinosa walked to the front door and heard loud music coming from inside of the house. MPO Phifer and Officer Espinosa knocked on the door and observed an unidentified male look out of the window. After the person recognized MPO Phifer and Officer Espinosa as uniform members of the Metropolitan Police Department, he was last seen running upstairs from the window.
MPO Phifer and Officer Espinosa knocked on the front door. The door became ajar and observed inside was several females conducting lap dances. These same females were dressed in attire not commonly worn in ublic (Ie: thongs, g-strings and bra's). Also noted was US Currency attached to an elastic band strapped to their leg. the observations were consistant with activity being conducted in strip clubs for profit.
MPO Phifer radioed nearby members of Metropolitan Police Department for Assistance and Officer David Jarboe and Officer Faraz Khan responded along with other members of MPD.
While on the scene, the spectators were drinking alcoholic beverages and holding US currency in their hands. A strong odor of Marijuana was also detected. MPD members then went inside and identified all the occupants of the residence. While conducting interviews, the listed narcotics were recovered by Officer Parker on a nearby window ledge inside of the home and placed on the listed property book.
The Marijuana was fiel... ested which gave a positive color reaction for the presence of THC, the active ingredient in Marijuana.
Upon further inspection of the home the rear kitchen was setup in a manner sumilar to a bar which consisted of plastic cups and liquor. In another room open condoms were also observed. The entire home was in disarray which was also consistant with it being a vacant property.
Further investigation revealed no one coulde be located as having given permissing to occupy the listed property. W-2, a nearby neighbor also told Officer Newman that he lived in the area for numerous years and the listed propery was supposed to be vancant.
All parties inside of the home were identified as being the defendants and placed under arrest. The defendant was later transported were later transported to the Sixth District for processing. the defendant him/herself verbally as being [redacted].
The defendant was placed under arrest for disorderly conduct

(Use PD 118 for defendant's written statement.)

2. RECORD CLERK'S NAME	3.	5.	64. PROPERTY BOOK/PAGE NO. PRISONER'S PROPERTY ONLY
TABRON			
ARREST RECORD SUMMARY 1. 2.	4.	6.	

65. BAIL REFORM ACT CASES: Was a statement made by defendant in reference to his/her failure to appear? ☐ Yes ☐ no
(If yes, include in Defendant's Version/Remarks Section above.)

66. PRINTED NAME - OFFICER MAKING STATEMENT	BADGE NUMBER	RANK	68. SIGNATURE OF REVIEWING OFFICIAL
Bonds, Casey	3761	OFC	
67. SIGNATURE OF OFFICER MAKING STATEMENT	UNIT	DATE	UNIT / DATE
	6D	3/15/2008	6D / 03/15/08

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 09-501 (RWR)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Thursday, April 8, 2010
Washington, D.C.

Deposition of ETHELBERT DALTON LOUIS

the plaintiff, called for examination by counsel for the defendants, pursuant to notice, held in the Office of the Attorney General, 441 Fourth Street, N.W., 6th Floor South, Washington, D.C. 20001, beginning at 1:14 p.m., before Kelly Susnowitz, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

* * *

[26] A. A few, probably three or four, somewhere around there.

Q. Are you aware that there were 20 folks arrested in that house?

A. Yes, I'm aware. The police said 21.

Q. Twenty-one?

A. Yeah, because they did mention that more than one time and, before that, they were talking about bringing the paddy wagon or whatever – I mean, the vehicle to pick us up, they were talking about the amount of people and that they would need, probably, some more.

Q. Based on the number of cars you saw leaving and the number of people you saw leaving and the information you heard while you were arrested, that there were 21 people being arrested, is it fair to say that there were over 30 people in the house at some point?

MR. LATTIMER: Objection. Relevance and materiality, calls for speculation.

A. I don't know that.

[27] Q. Now, when you arrived at 1:00 in the morning, you walked in through the front door?

A. Yes.

Q. And what did you see?

A. The house was dark.

Q. Dark, in what sense?

A. I mean, it was dark. The light was low. The house was dark and the music was low.

Q. Could you see individuals?

A. I could make out some, but the house was dark. If you were to turn those lights off, it was like that.

Q. Could you make out what the people were doing?

A. I saw some people sitting in the living room.

Q. Were they male or female?

A. Male and female.

Q. And they were just sitting in the living room?

A. Sitting in the living room.

[28] Q. Did you see any women dancing?

A. I saw – I probably saw a couple.

Q. Did you see any of the women with money in a garter belt or G – the garter belt?

A. I couldn't see that.

Q. Did you see any of the women giving any of the people that were there, lap dances?

A. They were dancing. I believe that's a lap dance.

Q. Well, do you know what a lap dance is?

A. Yeah, they're sitting on top of the person.

Q. Is that what you saw?

A. I saw a couple.

Q. Sitting on top of somebody that was sitting down on a chair?

A. Yes.

Q. Did you see anybody engage in any kind of sexual activity?

A. No.

Q. How long did you stay on the first floor?

[29] A. I was there a little bit. When I came in, walked around and went upstairs.

Q. Did you have a lap dance while you were downstairs?

A. No.

Q. Why did you go upstairs?

A. I asked where Fuzzy was and I was going to talk to him and they said he was upstairs, so I went upstairs.

Q. Who did you ask where Fuzzy was?

A. One of the guys, probably the tall guy they call Six-nine,

Q. Prior to that night, did you know Six-nine?

A. I'd seen him before.

Q. When you came in at 1:00 o'clock in the morning and you were on the first floor, did you recognize any of the people that was on the first floor, other than Six-nine?

A. Some people.

Q. Who did you recognize?

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 09-501 (RWR)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Wednesday, March 31, 2010
Washington, D.C.

The deposition of BRITTANY CHAQUE STRIBLING was called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice, in the Offices of Attorney General for the District of Columbia, 441 Fourth Street, Northwest, Washington, D.C., convened at 11:10 a.m. before Jonell Easton, a notary public, when were present on behalf of the parties:

* * *

[22] Q. Were you living with Lynn at that time?

A. At the time I was.

Q. Do you recognize anybody in that picture?

A. No.

Q. Now, when the police arrived or came upstairs and they told everybody to go downstairs, what do you do?

A. Got my bag and I was proceeding to walk out the door.

Q. What kind of bag?

A. A purse.

Q. Where was it?

A. Sitting on the floor.

Q. When you were upstairs, were you sitting on the floor just prior to the police arriving?

A. Yes, I was sitting on Lynn's lap.

Q. When you went downstairs, was the room still dim or were the lights on?

A. Lights were on.

Q. What do you recall seeing?

A. I recall seeing everybody sitting on the [23] floor, sitting along the walls, everybody in that exhibit.

Q. Did you, at that, time recognize any of the individuals?

A. No.

Q. Am I correct that you have testified that the only individuals that you knew there that evening were Tasha, Theodore, Joe and Lynn?

A. No.

Q. Who else did you know?

A. Stan.

Q. I'm sorry, and Stan.

When I asked you when you went upstairs and the lights were on, you did recognize Stan?

A. Not at that point.

Q. At what point did you realize Stan was there?

A. When they told me sit in the corner and I seen Stan.

Q. Where did you know Stan from?

A. Lynn's uncle and his roommate.

[24] Q. Since this arrest on the 16th of March, have you and Lynn talked about what happened at the house this evening?

A. Yes.

Q. What did you say and what did he say?

A. First I asked him why he was there when he knew we are leaving out of town and he said he wanted to wish his friend well before he got married.

Q. Who was the friend?

A. I don't know. I never met the guy.

Q. Do you know if the friend was there?

A. No, I don't know.

Q. Did you ask him who the friend was?

A. No, I didn't.

Q. What did you say to Lynn in response to what you told me he said to you?

A. I said okay, I mean.

Q. Were you upset that he was there?

A. No.

Q. When you went to 115 Anacostia Road, did [25] you know who owned that house?

A. No.

Q. Did you know who was renting the house?

A. No.

Q. That was your first time being there?

A. Yes.

Q. Do you know if that was Lynn's first time being there?

A. Yes.

Q. How do you know?

A. Because I asked him and I know he wouldn't lie.

Q. When the police told everybody to go downstairs, you went downstairs, then what happened next?

A. I proceeded to walk out the door.

Q. Front door?

A. Yes,

Q. And what happened?

A. They were going to let me leave until another police officer walked up, a detective, I

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 09-501 (RWR)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Thursday, April 8, 2010
Washington, D.C.

Deposition of LYNN WARWICK TAYLOR

the plaintiff, called for examination by counsel for the defendants, pursuant to notice, held in the Office of the Attorney General, 441 Fourth Street, N.W., 6th Floor South, Washington, D.C. 20001, beginning at 12:02 p.m., before Kelly Susnowitz, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

* * *

[22] lady sitting down, do you know who that woman is?

A. No, huh-huh. It looks like I may have seen her face before, but I don't know her.

Q. Now, you said that at some point your girlfriend showed up?

A. Yeah, uh-huh, Brittany.

Q. Why was Brittany there?

A. She was coming to get me. We were supposed to go out of town to Atlantic City.

Q. Did Brittany know that you were going to be at 115 Anacostia Road?

A. She knew that I was going to stop by.

Q. Did you tell her why you were going to stop by?

A. I told her I was going to see my sister, that's what I call her, my stepsister.

Q. Did you tell Brittany what was going to be going on in that house?

A. A bachelor's party, yes, sir.

Q. Do you know what time Brittany arrived?

A. I don't remember.

[23] Q. Do you know how long you were in the house before Brittany arrived, approximately?

A. I don't want to give you false information. I don't really remember. That was two years ago. I don't remember.

Q. Do you know if it was more than five minutes, and I'm talking from the time that you arrived –

A. She may have come, maybe, I'm going to say an hour, maybe an hour or two after I was there.

Q. And when she arrived, where within the house were you?

A. I was upstairs. I was upstairs the whole time.

Q. And when she came into the house, did you hear her calling your name?

A. Yes, she had called me on the cell phone, so I went down and opened the door for her and then we went back upstairs.

Q. When you came downstairs to open the door for Brittany, were there individuals in the living [24] room?

A. You know what, I didn't really pay that much attention. It wasn't that many people in there at that lime or they must have been scattered. I didn't really pay attention. I opened the door and we went back upstairs.

Q. Do you know if there was anybody in the kitchen area?

A. I was upstairs. I don't know.

Q. Did you stay upstairs the entire time, from the time Brittany showed up until the time the police arrived, were you upstairs?

A. I was upstairs, basically, the whole night.

Q. Other than the time that you came downstairs to open the door for Brittany, did you come downstairs at any other point that evening or early morning?

A. I was basically upstairs.

Q. Where were you and Brittany going?

A. Atlantic City.

[25] Q. What time were you supposed to leave?

A. We were supposed to leave that night. I told her I was going to run some errands and we were waiting on her friend who was coming from North Carolina, a young lady named, Jakcqway, and her and her boyfriend was going with us to Atlantic City and we never made it.

Q. Do you still see Brittany?

A. No, she left me.

Q. When was the last time – when did the two of you break up?

A. I don't know man, maybe a year and something ago.

Q. Since the breakup, you have not seen her?

A. Not at all. I heard she was a little big, having a baby or something.

Q. Let me ask, maybe, the obvious question, you are not the father of that baby?

A. No, not at all.

Q. Did you know if Brittany ever worked at the dance clubs or the strip clubs?

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 09-501 (RWR)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Wednesday, March 31, 2010
Washington, D.C.

The deposition of ALISSA SHANTAY COLE was called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice, in the Offices of Attorney General for the District of Columbia, 441 Fourth Street, Northwest, Washington, D.C., convened at 2:10 p.m. before Jonell Easton, a notary public, when were present on behalf of the parties:

* * *

[6] A. Okay.

Q. Lastly, if, for any reason, you need a break, let me know.

A. Okay.

Q. And the only time that I will not allow you to take a break is if I have asked a question and you have not given an answer. I would like you to give an answer before we take a break. Okay?

A. Okay.

Q. Ms. Cole, do you go by any other nicknames?

A. Lola.

MR. LATTIMER; One of the things is she can't take down a nod of the head, so if you could say yes or no.

THE WITNESS: Okay, no problem.

BY MR. JACKSON:

Q. How do you spell that?

A. L-O-L-A.

Q. Under what circumstance do you use the name Lola?

[7] A. I use it as a dance name and nickname.

Q. And is dancing your profession?

A. Yes.

Q. Where do you work?

A. Irving's.

Q. How long have you been there?

A. About three years.

Q. What is your date of birth?

A. [redacted]

Q. What is your Social Security number?

A. [redacted]

Q. Do you receive any kind of financial assistance or medical assistance from the D.C. government?

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

[8] Q. Where do you live?

A. Baltimore, Maryland.

Q. Do you live with anybody or?

A. I live alone, me and my children.

Q. How many children do you have?

A. Two.

Q. Boys?

A. [redacted]

Q. Is her birthday coming up soon?

A. July.

Q. Let me move to the late night of March 15, early morning March 16, 2008. At some point during either the 15th or 16th, were you at 115 Anacostia Road, N.W. in Washington?

A. Ye .

Q. What time did you arrive there?

A. I think between 11:00 and 12:00,

Q. And what was the purpose of going there?

A. I was going to a bachelor party.

Q. Did someone ask you?

[9] A. Yeah, a girlfriend asked me, we were at Irving's and we left to go to the party.

Q. Who was the girlfriend?

A. Brittany Brown.

Q. Prior to March 15, had you ever been at 115 Anacostia Road before?

A. No.

Q. Was its just you and Brittany when you went from work to Anacostia Road?

A. It was just us two.

Q. And did you drive there or did she drive?

A. She drove.

Q. Do you know if Brittany Brown had ever been at 115 Anacostia Road?

A. No, she hadn't been there before.

Q. Remember what I said, let me finish my question before you give the answer.

How do you know she had never been there before?

A. Just my friend, she said do you want to go do this party, bachelor party, and I said yes, I

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/01/11]

Civil Action No. 09-571 (RMC)

THEODORE WESBY, *et al.*,
Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

DEFENDANT ANTHONY CAMPANALE'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. Pro. 33, Defendant Anthony Campanale, having been first duly sworn under oath, upon information and belief, gives the following answers to interrogatories propounded to defendant by plaintiff:

(a) Defendant reserves the right to amend, revise, or supplement its answers to these interrogatories if and when new or different information becomes available.

(b) For any additional responsive information made available through deposition testimony, the defendant incorporates such information for the purpose of giving the plaintiff notice that such information exists, but does not adopt such testimony as accurate and complete.

(c) Defendant, in accordance with Fed R. Civ. Pro. 33(d), may refer plaintiffs to the documents attached

hereto in order to answer these interrogatories when such answer "maybe derived or ascertained" from the document[s] and "the burden of deriving or ascertaining the answer is substantially the same" for both parties.

(d) Defendant objects to the production of any information that is protected by the attorney-client privilege, deliberative process privilege, work product doctrine or any similarly recognized privilege. Inadvertent production of any information or documents so privileged does not constitute a waiver of such privilege or any grounds for grounds for objecting to the discovery request.

(e) Defendant objects to any part of the Plaintiffs' instruction that seeks to impose any discovery requirements outside the scope of the rules, especially any obligation to produce information not in the Defendant's control or not currently known to its attorneys after reasonable inquiry.

INTERROGATORIES

1. Please fully state your full name, date of birth, martial status, social security number, business address and residential address for the last five years, and your spouse's name.

RESPONSE: Further the defendant objects to this Interrogatory to the extent that it seek my residential address for the last five years, my date of birth, my marital status, and my social security number because such information is an unwarranted invasion of my privacy. Subject to and without waiving the above objections, I answer this interrogatory as follows: my name is Anthony Campanale; my business address is 100 42nd St NE Washington, DC 20019.

2. Give a concise statement of the facts surrounding the arrest of the plaintiffs as you contend it occurred. In answering, please identify each and every document utilized, review or relied upon to respond or which allegedly supports the representations in your response, and specifically identify the individual answering this interrogatory.

RESPONSE: I was on routine patrol with Officer Parker when Officer Jarboe called to inform us that there were people in a house at 115 Anacostia Avenue, NE, Washington. When we arrived at the address Officer Jarboe told us that the people in the house should not be there. He also told us that he had received information from neighbors that this was an ongoing problem. Officer Jarboe further said that the neighbors had advised him that the house was abandoned and nobody should be in it. I then proceeded to the rear of the house to make sure that nobody ran out the back door. As I entered the back door I observed all of the individuals sitting on the floor in the living room. I observed some individuals holding cups of liquor and beer and there were cups of liquor and beer on the floor. I could also smell marijuana. I also observed female provocatively dressed with dollars bills in a garter belt around their leg. All individuals were asked who the owner of the house was and where the owner was. The individuals were asked to sit in the living room. I then proceeded to take pictures of all the individuals and every room in the house. Sergeants Suber and Matthews then arrived on the scene and at that point we began asking the individuals for identification. When asked who gave them permission to be in the house plaintiff Natasha Chiitam indicated that a woman by the name of "Peaches" gave them permission. I know that Officer Parker spoke with "Peaches" but she refused to come

back to the house. None of the individuals could say who gave them permission to be in the house. Sergeant Suber made the decision to arrest the individuals for unlawful entry, After the scene was cleared I returned to the Sixth District police station for processing.

3. For each plaintiff, detail each and every illegal act that you observed him or her engage in. In answering, state with specificity where each identified plaintiff was located at the time that he/she was engaged in the illegal conduct alleged and all evidence that you collected in support of the alleged illegal conduct.

RESPONSE: Each of the plaintiffs was arrested for unlawful entry.

4. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who claim that they witnessed all or part of the incident referenced in the complaint, or who were near or at the scene at the time of the occurrence. State concisely but completely what such persons claim to have witnessed.

RESPONSE: Defendant objects to this Interrogatory to the extent that it requests me to disclose the home address and telephone numbers of all persons who claim to have witnessed all or part of the incident referenced in the complaint because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who claim to have witnessed all or part of the incident. I did not question any of the police officers or officials as to what the observed, and therefore, I don't know what they claimed to have witnessed.

5. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who arrived at the scene within one (1) hour after the occurrence. State concisely but completely of what such persons claim to have witnessed.

RESPONSE: Defendant objects to this Interrogatory to the extent that it requests me to disclose the home address and telephone numbers of all persons who arrived on the scene within one (1) hour after the occurrence because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to personal knowledge of the occurrence. Subject to and without waiving the above objections, Officer Parker, Officer Cory Bonds, Officer Khan, Officer Espinosa, Officer Jarboe, Sergeant Suber, Sergeant Mathews, Officer Newman, MPO Phifer arrived at the scene within one hour after the occurrence and their address is 100 42nd St NE Washington DC 20019; (202) 698-0880. I don't know what they claimed to have witnessed.

6. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who are known by you to have, or have claimed to have, personal knowledge or information of relevant facts which may pertain to the cause of the occurrence. State concisely but completely the nature of such personal knowledge or information.

RESPONSE: Defendant objects to this Interrogatory to the extent that request I disclose the home address and telephone numbers of all persons who have or claim to have personal knowledge or information of the facts in this case because providing such information

is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to personal knowledge or information of the occurrence. Subject to and without waiving the above objection, I don't know who claims to have personal knowledge or information of relevant facts which may pertain to the cause of the occurrence.

7. Have any of the persons whose names were furnished in response to any of the foregoing Interrogatories, or anyone else, made or given to you any statement or report concerning the incident which is the subject of this lawsuit? If the Answer is in the affirmative, state the name, home address, home telephone number, occupation, business address and business telephone number of each such person who made or gave such statement or report, the dates thereof, the content of each such statement, whether it was written or reduced to writing and the names and addresses of any and all persons in custody of possession thereof. Please attach a copy of the same to your Answers.

RESPONSE: No one has given me a statement. I am not aware of any statements that exist.

8. State the name, present home address, occupation and business address of any and all persons who made an investigation to ascertain any fact relevant to the issues in this case, including particularly, but not exclusively, all investigators, officers, detectives, police officials, experts and/or specialists. State concisely but completely the facts ascertained. If you will do so without a Request for Production, please attach a copy of any resulting reports(s) to your Answers.

RESPONSE: Defendant objects to this Interrogatory to the extent that request I disclose the home address of persons who investigated the facts at issue in this case because providing such information is an unwarranted invasion of privacy. In any event, I do not know what investigation this Interrogatory is referencing. Subject to and without waiving the above objection, to the best of my knowledge there was no investigation or interviews done other that what was conducted on the scene. I do not have in my custody or possession any investigative reports.

9. Did any of the plaintiffs make or give to you, or your agents or representatives, any statement or report concerning the occurrences referred to in the complaint or concerning any fact pertaining to any issue in this case? If the answer is in the affirmative, state when, where and to whom such statement(s) was/were made or given, whether or not it is in writing, the content of such statement, the name, home address, home telephone number, occupation, business address and business telephone number of any and all persons who have the original, and attach a copy thereof to your answers.

RESPONSE: I recall asking several of the individuals for identification and who gave them permission to be in the house. I do not recall which individuals I questioned. As previously stated only plaintiff Chittam said that Peaches gave them permission to be in the house. Others stated that they were there at the invitation of somebody else.

10. Have you engaged any expert(s) whom you intend to call as witness(es) at trial, whether in anticipation for trial, preparation for litigation, or for any other purpose contemplated to obtain opinions, advice or information regarding facts or issues relevant to

this case? If yes, state: (a) the names home addresses, occupation and business addresses of said expert(s), (b) whether any report, oral or written, has bee obtained from said experts(s), (c) furnish the dates thereof, (d) attach here a copy of said written reports(s), and (e) state the contents of any and all oral reports from said expert(s) as to the finding and opinions of the said expert.

RESPONSE: I have not engaged any expert(s) whom I intend to call as witness(es) at trial,

11. Do you have within your possession or control, or do you have knowledge of any photograph, picture, audio recording, motion picture, plats or diagrams of the scene, the plaintiff(s) or other items which pertain in any way to the occurrence alleged in plaintiffs' complaint? If the answer to this Interrogatory is in the affirmative in any way, fully identify the item or items in your possession.

RESPONSE: I did take pictures on the night of the incident and all pictures have been turned over to MPD. Based on information and belief, those pictures were produced by the District of Columbia in its initial disclosures. I also know that there is booking pictures of the individuals arrested.

12. Identify each of the police officer, including supervisors, who responded to the scene which is the subject of this lawsuit. For each of the identified officers, please provide the following information:

a. His/Her rank, assignment location, and duties on the scene;

b. Whether or not he/she assisted in the arrest of the plaintiffs

RESPONSE: Please refer to Interrogatory number 5 for the names and rank of all police officers and supervisors who responded to the scene. For all identified officers named I do not know their assignment location, duties on the scene or whether or not they assisted in the arrest of plaintiffs.

13. Identify any and all lawsuits and/or disciplinary proceedings of any kind in which you have been involved in, in any way, during your tenure with the Metropolitan Police Department and state in detail the nature of the disciplinary proceedings and/or lawsuit, the date of the disciplinary proceeding or lawsuit was filed, the allegations asserted therein, the outcome of the disciplinary proceedings or lawsuit, the name of all parties to the lawsuit, the forum and/or court in which the disciplinary proceeding or lawsuit was filed and the outcome of the proceeding, indicating whether the proceeding is still pending.

RESPONSE: [redacted]

14. Identify any and all instances wherein you have been the subject of any complaint(s) lodged by citizens during his tenure with the Metropolitan Police Department and state in detail the nature of the complaint, the date of the complaint was lodged, the allegations asserted therein, the outcome of any proceedings related thereto, the name of the complaining party, indicating whether the complaint is still pending and identify any and all documents which relate in any way to each such proceeding(s) or complaint(s).

RESPONSE: [redacted]

15. Identify all reports, memorandums, notes, investigations or writings of any kind which refer to any stop, detention, assault and/or arrest of any of the plaintiffs, including but not limited to, the date of the document, author of the document, the recipient of the document and the subject matter of the document. Please produce all such documents.

RESPONSE: Prior to the incident I had no knowledge of any of the plaintiffs. As a result of the events of March 15, 2008, the only reports I am aware of are the PD 163's. Based on information and belief, the PD 163s were included in the District of Columbia's initial disclosures.

16. State with specificity the factual basis of your answer's affirmative defenses.

RESPONSE: The affirmative defenses have been asserted by my attorney.

17. Identify all documents which reference in any way the training provided to you during your tenure as a Metropolitan Police Officer.

RESPONSE: See Exhibit 1, attached hereto.

18. Please state your specific duties on the date in which the incident occurred, including your specific assignment, to whom you were to report, the name of all the officers who were working with you on the day of question, the vehicle assigned to you, your duty hours for that day and what specific duties were you performing at the time of the incident.

RESPONSE: The Defendant objects to this Interrogatory as it is unclear which officers plaintiff is inquiring about. Subject to and without waiving the above objection, on the night of the incident I was assigned to the power shift which is regular patrol. I was to report to Sergeant Mary Mathews. Please refer to Interrogatory number five for the names of all officers I was working with on the night in question. I don't remember the vehicle number but it was a DC Cruiser. My hours were 1930-0400, at the time of the incident I was on patrol.

19. Describe in detail the basis for your 1) detention of any plaintiff, 2) handcuffing of any plaintiff and 3) arrest of any plaintiff, and in doing so please identify any and all reports, notes, or documentation of any kind that memorializes the referenced events and reasons stated.

RESPONSE: Individuals were detained, handcuffed and arrested for unlawful entry.

20. If it is your contention that you did not detain, handcuff or arrest any plaintiff during the incident which is the subject of this lawsuit, identify all person(s) who you contend engaged in the foregoing, providing their full name, rank, and business address.

RESPONSE: I do not know who would have detained, handcuffed or arrested any of the plaintiff's on the night of the incident.

21. Please describe in detail the facts and circumstances surrounding how you came to enter the residence located at 115 Anacostia Road, N.E., Washington, D.C.

RESPONSE: See Interrogatory No. 2.

22. If it is your contention that you did not enter the residence identified above, identify all person(s) who you contend entered the residence, providing their full name, rank and business address.

RESPONSE: I did enter the house on the night of the incident.

I have read the foregoing answers to interrogatories, and they are true to the best of my knowledge, information, and belief.

/s/Anthony Campanale
ANTHONY CAMPANALE

SWORN AND SUBSCRIBED before me, a Notary Public, this 19th day of March 2010.

/s/ Dawne Rhonda Daye
Notary Public, D.C.

My Commission Expires:

DANE RHONDA DAYE
NOTARY PUBLIC DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES JANUARY 31, 2014

[Counsel's Signature Block and
Certificate of Service Omitted in Printing.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/01/11]

Civil Action No. 09-571 (RMC)

THEODORE WESBY, *et al.*,

Plaintiff,

v.

DISTRICT OF COLUMBIA *et al.*,

Defendants.

DEFENDANT EDWIN ESPINOSA'S RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. Pro. 33, Defendant Edwin Espinosa, having been first duly sworn under oath, upon information and belief, gives the following answers to interrogatories propounded to defendant by plaintiff:

(a) Defendant reserves the right to amend, revise, or supplement its answers to these interrogatories if and when new or different information becomes available.

(b) For any additional responsive information made available through deposition testimony, the defendant incorporates such information for the purpose of giving the plaintiff notice that such information exists, but does not adopt such testimony as accurate and complete.

(c) Defendant, in accordance with Fed R. Civ. Pro. 33(d), may refer plaintiff to the documents attached hereto in order to answer these interrogatories when such answer "maybe derived or ascertained" from the document[s] and "the burden of deriving or ascertaining the answer is substantially the same" for both parties.

(d) Defendant objects to the production of any information that is protected by the attorney-client privilege, deliberative process privilege, work product doctrine or any similarly recognized privilege. Inadvertent production of any information or documents so privileged does not constitute a waiver of such privilege or any grounds for grounds for objecting to the discovery request.

(e) Defendant objects to any part of the Plaintiff's instruction that seeks to impose any discovery requirements outside the scope of the rules, especially any obligation to produce information not in the Defendant's control or not currently known to its attorneys after reasonable inquiry.

INTERROGATORIES

1. Please fully state your full name, date of birth, martial status, social security number, business address and residential address for the last five years, and your spouse's name.

RESPONSE: The Defendant objects to this Interrogatory to the extent that it seeks irrelevant or inadmissible information, or information not likely to lead to the discovery or relevant or admissible evidence. Further the defendant objects to this Interrogatory to the extent that it seek my residential address for the last five years, my date of birth, my social security number, marital status, and the name of my

spouse because such information is an unwarranted invasion of my privacy. Subject to and without waiving the above objections, I answer this interrogatory as follows: my name is Edwin Espinosa and my business address is 100 42nd St NE Washington, DC 20019.

2. Give a concise statement of the facts surrounding the arrest of the plaintiffs as you contend it occurred. In answering, please identify each and every document utilized, review or relied upon to respond or which allegedly supports the representations in your response, and specifically identify the individual answering this interrogatory.

RESPONSE: On March 15, 2008, I was partnered with my training Officer, MPO Phifer. MPO Phifer had a conversation with Officer Jarboe. I not know the substance of their conversation. When MPO Phifer and I left the District police station, MPO Phifer drove to 115 Anacostia Avenue, NE. When we arrived at 115 Anacostia Avenue there were other police officers already on scene. MPO Phifer approached the premises and knocked on the door. An individual opened the door and I could see people in the house scattering into different rooms. I was not one of the first officer and I do not know who entered first. I believe I was one of the last officer to enter and I just stood by the door. I did not question, search, detain, handcuff or tell any of the individuals that they were under arrest. Additionally, I did not transport any of the individuals to the District police station. After MPO Phifer and I left the premises we went directly to the Sixth District station to begin the arrest process. I did not interview any of the individuals who had been arrested. My only involvement was that I completed the 163 by copying the individuals information from the MPD form 256. Although I signed the 163 I did not write the narrative.

3. For each plaintiff, detail each and every illegal act that you observed him or her engage in. In answering, state with specificity where each identified plaintiff was located at the time that he/she was engaged in the illegal conduct alleged and all evidence that you collected in support of the alleged illegal conduct,

RESPONSE: Each of the plaintiffs was arrested for unlawful entry.

4. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who claim that they witnessed all or part of the incident referenced in the complaint, or who were near or at the scene at the time of the occurrence. State concisely but completely what such persons claim to have witnessed.

RESPONSE: I did not question any of the police officers or officials as to what they observed, and therefore, I don't know what they claimed to have witnessed. To the best of my recollection the only people known to me who would have personal knowledge would be the police officers and officials on the scene. I do not know any of their homes addresses or telephone numbers. All of the police officers and officials on the scene were from the Sixth District. I do not recall all of the officers or officials on the scene but I do recall Officer Khan, MPO Phifer and Officer Jarboe being present.

5. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who arrived at the scene within one (1) hour after the occurrence. State concisely but completely of what such persons claim to have witnessed.

RESPONSE: I do not know who arrived on the scene within one (1) hour after the occurrence.

6. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who are known by you to have, or have claimed to have, personal knowledge or information of relevant facts which may pertain to the cause of the occurrence. State concisely but completely the nature of such personal knowledge or information.

RESPONSE: Defendant objects to this Interrogatory to the extent that request I disclose the home address and telephone numbers of all persons who arrived on the scene within one (1) hour after the occurrence because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to personal knowledge of the occurrence. I did not question any of the police officers or officials as to their personal knowledge or information of relevant facts.

7. Have any of the persons whose names were furnished in response to any of the foregoing Interrogatories, or anyone else, made or given to you any statement or report concerning the incident which is the subject of this lawsuit? If the Answer is in the affirmative, state the name, home address, home telephone number, occupation, business address and business telephone number of each such person who made or gave such statement or report, the dates thereof, the content of each such statement, whether it was written or reduced to writing and the names and addresses of any and all persons in custody of possession thereof. Please attach a copy of the same to your Answers.

RESPONSE: No one has given me a statement. I am not aware of any statements that exist.

8. State the name, present home address, occupation and business address of any and all persons who made an investigation to ascertain any fact relevant to the issues in this case, including particularly, but not exclusively, all investigators, officers detectives, police officials, experts and/or specialists. State concisely but completely the facts ascertained. If you will do so without a Request for Production, please attach a copy of any resulting reports(s) to your Answers.

RESPONSE: Defendant objects to this Interrogatory to the extent that request I disclose the home address of persons who investigated the facts at issue in this case because providing such information is an unwarranted invasion of privacy. In any event, I do not know what investigation this Interrogatory is referencing. I do not have in my custody or possession any investigative reports.

9. Did any of the plaintiffs make or give to you, or your agents or representatives, any statement or report concerning the occurrences referred to in the complaint or concerning any fact pertaining to any issue in this case? If the answer is in the affirmative, state when, where and to whom such statement (s) was/were made or given, whether or not it is in writing, the content of such statement, the name, home address, home telephone number, occupation, business address and business telephone number of any and all persons who have the original, and attach a copy thereof to your answers.

RESPONSE: No.

10. Have you engaged any expert(s) whom you intend to call as witness(es) at trial, whether in anticipation for trial, preparation for litigation, or for any other purpose contemplated to obtain opinions, advice or information regarding facts or issues relevant to this case? If yes, state: (a) the names home addresses, occupation and business addresses of said expert(s), (b) whether any report, oral or written, has bee obtained from said experts(s), (c) furnish the dates thereof, (d) attach here a copy of said written reports(s), and (e) state the contents of any and all oral reports from said expert(s) as to the finding and opinions of the said expert.

RESPONSE: I have not engaged any expert(s) whom I intend to call as witness(es) at trial,

11. Do you have within your possession or control, or do you have knowledge of any photograph, picture, audio recording, motion picture, plats or diagrams of the scene, the plaintiff(s) or other items which pertain in any way to the occurrence alleged in plaintiffs' complaint? If the answer to this Interrogatory is in the affirmative in any way, fully identify the item or items in your possession.

RESPONSE: I did not take any pictures nor do I have any pictures in my possession or control. I know that there were pictures taken, and based on information and belief, those pictures were produced by the District of Columbia in its initial disclosures.

12. Identify each of the police officer, including supervisors, who responded to the scene which is the subject of this lawsuit. For each of the identified officers, please provide the following information:

a. His/Her rank, assignment location, and duties on the scene;

b. Whether or not he/she assisted in the arrest of the plaintiffs

RESPONSE: The only people I recall being on the scene were myself, MPO Phifer, Officer Jarboe and Officer Khan. I do not know their assignment location, duties on the scene or whether or not they assisted in the arrest of plaintiffs.

13. Identify any and all lawsuits and/or disciplinary proceedings of any kind in which you have been involved in, in any way, during your tenure with the Metropolitan Police Department and state in detail the nature of the disciplinary proceedings and/or lawsuit, the date of the disciplinary proceeding or lawsuit was filed, the allegations asserted therein, the outcome of the disciplinary proceedings or lawsuit, the name of all parties to the lawsuit, the forum and/or court in which the disciplinary proceeding or lawsuit was filed and the outcome of the proceeding, indicating whether the proceeding is still pending.

RESPONSE: I have not been the subject of any lawsuits and/or disciplinary proceedings of any kind.

14. Identify any and all instances wherein you have been the subject of any complaint(s) lodged by citizens during his tenure with the Metropolitan Police Department and state in detail the nature of the complaint, the date of the complaint was lodged, the allegations asserted therein, the outcome of any proceedings related thereto, the name of the complaining party, indicating whether the complaint is still pending and identify any and all documents which relate in any way to each such proceeding(s) or complaint(s).

RESPONSE: [redacted]

15. Identify all reports, memorandums, notes, investigations or writings of any kind which refer to any stop, detention, assault and/or arrest of any of the plaintiffs, including but not limited to, the date of the document, author of the document, the recipient of the document and the subject matter of the document. Please produce all such documents.

RESPONSE: The only documents that I am aware of would be the PD Form 163, but these reports are not in my custody or control.

16. State with specificity the factual basis of your answer's affirmative defenses.

RESPONSE: I did not detain or handcuff any of the plaintiffs. Further, the affirmative defenses have been asserted by my attorney.

17. Identify all documents which reference in any way the training provided to you during your tenure as a Metropolitan Police Officer.

RESPONSE: See Exhibit 1, attached hereto.

18. Please state your specific duties on the date in which the incident occurred, including your specific assignment, to whom you were to report, the name of all the officers who were working with you on the day of question, the vehicle assigned to you, your duty hours for that day and what specific duties were you performing at the time of the incident.

RESPONSE: I was on regular patrol. I reported to MPO Phifer. No other officers were working with me. I was assigned to a DC cruiser, and was assigned to patrol PSA 603. My duty hours were 2300-0630 (11:00 pm-6:30 am).

19. Describe in detail the basis for your 1) detention of any plaintiff, 2) handcuffing of any plaintiff and

3) arrest of any plaintiff, and in doing so please identify any and all reports, notes, or documentation of any kind that memorializes the referenced events and reasons stated.

RESPONSE: I did not detain or handcuff any plaintiffs. I completed the arrest report because MPO Phifer gave me that assignment.

20. If it is your contention that you did not detain, handcuff or arrest any plaintiff during the incident which is the subject of this lawsuit, identify all person(s) who you contend engaged in the foregoing, providing their full name, rank, and business address.

RESPONSE: As stated previously I completed the arrest reports because I was given that assignment by my training officer MPO Phifer. I did not detain or handcuff any of the plaintiffs. I do not know who detained, handcuff or arrested any of the plaintiffs.

21. Please describe in detail the facts and circumstances surrounding how you came to enter the residence located at 115 Anacostia Road, N.E., Washington, D.C.

RESPONSE: See, answer to interrogatory 2, above.

22. If it is your contention that you did not enter the residence identified above, identify all person(s) who you contend entered the residence, providing their full name, rank and business address.

RESPONSE: I did enter the residence.

I have read the foregoing answers to interrogatories, and they are true to the best of my knowledge, information, and belief.

/s/ Edwin Espinosa
EDWIN ESPINOSA

SWORN AND SUBSCRIBED before me, a Notary Public, this 19th day of March, 2010.

/s/ Dawne Daye
Notary Public, D.C.

My Commission Expires:

DAWNE RHODNA DAYE
NOTARY PUBLIC DISTRICT OF COLUMBIA
MY COMMISSIONS EXPIRES JANUARY 31, 2014

[Counsel's Signature Block and
Certificate of Service Omitted in Printing.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/01/11]

Civil Action No. 09-571 (RMC)

THEODORE WESBY, *et al.*,

Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

DEFENDANT FARAZ KHAN'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. Pro. 33, Defendant Faraz Khan, having been first duly sworn under oath, upon information and belief, gives the following answers to interrogatories propounded to defendant by plaintiff:

(a) Defendant reserves the right to amend, revise, or supplement its answers to these interrogatories if and when new or different information becomes available.

(b) For any additional responsive information made available through deposition testimony, the defendant incorporates such information for the purpose of giving the plaintiff notice that such information exists, but does not adopt such testimony as accurate and complete.

(c) Defendant, in accordance with Fed R. Civ. Pro. 33(d), may refer plaintiffs to the documents attached

hereto in order to answer these interrogatories when such answer "maybe derived or ascertained" from the document[s] and "the burden of deriving or ascertaining the answer is substantially the same" for both parties.

(d) Defendant objects to the production of any information that is protected by the attorney-client privilege, deliberative process privilege, work product doctrine or any similarly recognized privilege. Inadvertent production of any information or documents so privileged does not constitute a waiver of such privilege or any grounds for grounds for objecting to the discovery request.

(e) Defendant objects to any part of the Plaintiff's instruction that seeks to impose any discovery requirements outside the scope of the rules, especially any obligation to produce information not in the Defendant's control or not currently known to its attorneys after reasonable inquiry.

INTERROGATORIES

1. Please fully state your full name, date of birth, martial status, social security number, business address and residential address for the last five years, and your spouse's name.

RESPONSE: The Defendant objects to this Interrogatory to the extent that it seeks irrelevant or inadmissible information, or information not likely to lead to the discovery of relevant or admissible evidence. Further the defendant objects to this interrogatory to the extent that it seeks my residential address for the last five years, my date of birth, my social security number and my marital status because such information is an unwarranted invasion of my privacy. Subject to and without waiving the above

objections, I answer this interrogatory as follows: my name is Faraz Khan and my business address is 100 42nd St NE Washington, DC 20019.

2. Give a concise statement of the facts surrounding the arrest of the plaintiffs as you contend it occurred. In answering, please identify each and every document utilized, review or relied upon to respond or which allegedly supports the representations in your response, and specifically identify the individual answering this interrogatory.

RESPONSE: On the night in question, I was riding with my training officer, Officer Jarboe. MPO Phifer had a conversation with Officer Jarboe about going to 115 Anacostia Avenue, NE, Washington. I do not recall the exact nature of the conversation between the two of them. Officer Jarboe then drove to 115 Anacostia Avenue and stopped at the rear of the house. I then followed Officer Jarboe into the house through the front door. I saw females dressed only in their bra and thong with money hanging out their garter belts. During the time I was in the house I stayed in the living room. I do not recall who made the decision to arrest the individuals. I returned to the Sixth District police station and began to process the arrestees. MPO Phifer wrote the narrative on the 163 and I signed it. I do not recall who told me to sign the 163.

3. For each plaintiff, detail each and every illegal, act that you observed him or her engage in. In answering, state with specificity where each identified plaintiff was located at the time that he/she was engaged in the illegal conduct alleged and all evidence that you collected in support of the alleged illegal conduct.

RESPONSE: Each of the plaintiffs was arrested for unlawful entry.

4. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who claim that they witnessed all or part of the incident referenced in the complaint, or who were near or at the scene at the time of the occurrence. State concisely but completely what such persons claim to have witnessed

RESPONSE: I did not question any of the police officers or officials as to what they observed, and therefore, I don't know what they claimed to have witnessed. I do not know any of their home addresses or telephone numbers. All of the police officers and officials on the scene were from the Sixth District.

5. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who arrived at the scene within one (1) hour after the occurrence. State concisely but completely of what such persons claim to have witnessed.

RESPONSE: Defendant objects to this Interrogatory to the extent that request I disclose the home address and telephone numbers of all persons who arrived on the scene within one (1) hour after the occurrence because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to have personal knowledge of the occurrence. Subject to and without waiving the above objection, Officer Jarboe, MPO Phifer, Officer Campanale, Officer Newman, Officer Simonette, Officer Espinosa, Sergeant Suber, Sergeant Matthews, arrived at the scene within one hour after the occurrence and their address is 100 42nd St NE Washington DC 20019; (202) 698-0880. I did not question any of the police

officers or officials as to they observed, and therefore, I do not know what they may have witnessed.

6. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who are known by you to have, or have claimed to have, personal knowledge or information of relevant facts which may pertain to the cause of the occurrence. State concisely but completely the nature of such personal knowledge or information.

RESPONSE: Defendant objects to this Interrogatory to the extent that I am asked to disclose the home address and telephone numbers of all persons who have or claimed to have personal knowledge or information of the facts of this case because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to have personal knowledge or information of the facts of the occurrence. Subject to and without waiving the above objection, I don't know who claims to have personal knowledge or information of relevant facts which may pertain to the cause of the occurrence.

7. Have any of the persons whose names were furnished in response to any of the foregoing Interrogatories, or anyone else, made or given to you any statement or report concerning the incident which is the subject of this lawsuit? If the Answer is in the affirmative, state the name, home address, home telephone number, occupation, business address and business telephone number of each such person who made or gave such statement or report, the dates thereof, the content of each such statement, whether it was written or reduced to writing and the names and

addresses of any and all persons in custody of possession thereof. Please attach a copy of the same to your Answers.

RESPONSE: Defendant objects to this Interrogatory to the extent that I am asked to disclose the home address and telephone numbers of all persons who have or claimed to have personal knowledge or information of the facts of this case because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to have personal knowledge or information of the facts of the occurrence. Subject to and without waiving the above objection, the only statement given to me was the narrative on the 163. The narrative was completed by MPO Phifer.

8. State the name, present home address, occupation and business address of any and all persons who made an investigation to ascertain any fact relevant to the issues in this case, including particularly, but not exclusively, all investigators, officers, detectives, police officials, experts and/or specialists. State concisely but completely the facts ascertained. If you will do so without a Request for Production, please attach a copy of any resulting reports(s) to your Answers.

RESPONSE: I do not know what investigation this Interrogatory is referring to. I do not have in my custody or possession any investigative reports.

9. Did any of the plaintiffs make or give to you, or your agents or representatives, any statement or report concerning the occurrences referred to in the complaint or concerning any fact pertaining to any issue in this case? If the answer is in the affirmative, state when, where and to whom such statement(s)

was/were made or given, whether or not it is in writing, the content of such statement, the name, home address, home telephone number, occupation, business address and business telephone number of any and all persons who have the original, and attach a copy thereof to your answers.

RESPONSE: No.

10. Have you engaged any expert(s) whom you intend to call as witness(es) at trial, whether in anticipation for trial, preparation for litigation, or for any other purpose contemplated to obtain opinions, advice or information regarding facts or issues relevant to this case? If yes, state: (a) the names home addresses, occupation and business addresses of said expert(s), (b) whether any report, oral or written, has bee obtained from said experts(s), (c) furnish the dates thereof, (d) attach here a copy of said written reports(s), and (e) state the contents of any and all oral reports from said expert(s) as to the finding and opinions of the said expert.

RESPONSE: I have not engaged any expert(s) whom I intend to call as witness(es) at trial.

11. Do you have within your possession or control, or do you have knowledge of any photograph, picture, audio recording, motion picture, plats or diagrams of the scene, the plaintiff(s) or other items which pertain in any way to the occurrence alleged in plaintiffs' complaint? If the answer to this Interrogatory is in the affirmative in any way, fully identify the item or items in your possession.

RESPONSE: I did not take any pictures nor do I have any pictures in my possession or control. I know that there were pictures taken, and based on information

and belief, those pictures were produced by the District of Columbia in its initial disclosures.

12. Identify each of the police officer, including supervisors, who responded to the scene which is the subject of this lawsuit. For each of the identified officers, please provide the following information:

a. His/Her rank, assignment location, and duties on the scene;

b. Whether or not he/she assisted in the arrest of the plaintiffs

RESPONSE: Please refer to Interrogatory number 5 for the names and rank of all police officers and supervisors who responded to the scene, For all identified officers named I do not know their assignment location, duties on the scene or whether or not they assisted in the arrest of plaintiffs.

13. Identify any and all lawsuits and/or disciplinary proceedings of any kind in which you have been involved in, in any way, during your tenure with the Metropolitan Police Department and state in detail the nature of the disciplinary proceedings and/or lawsuit, the date of the disciplinary proceeding or lawsuit was filed, the allegations asserted therein, the outcome of the disciplinary proceedings or lawsuit, the name of all parties to the lawsuit, the forum and/or court in which the disciplinary proceeding or lawsuit was filed and the outcome of the proceeding, indicating whether the proceeding is still pending.

RESPONSE: I have never been the subject of a lawsuit or subject to discipline.

14. Identify any and all instances wherein you have been the subject of any complaint(s) lodged by citizens

during his tenure with the Metropolitan Police Department and state in detail the nature of the complaint, the date of the complaint was lodged, the allegations asserted therein, the outcome of any proceedings related thereto, the name of the complaining party, indicating whether the complaint is still pending and identify any and all documents which relate in any way to each such proceeding(s) or complaint(s).

RESPONSE: I have never had a citizen complaint filed against me.

15. Identify all reports, memorandums, notes, investigations or writings of any kind which refer to any stop, detention, assault and/or arrest of any of the plaintiffs, including but not limited to, the date of the document, author of the document, the recipient of the document and the subject matter of the document. Please produce all such documents.

RESPONSE: Prior to the night of the incident, I had no knowledge of any of the plaintiffs. As a result of the events March 15, 2008, the only reports I am aware of are the PD 163's. Based on information and belief, the PD 163's I completed and the PD 163's completed by other police officers were included in the District of Columbia's initial disclosures.

16. State with specificity the factual basis of your answer's affirmative defenses.

RESPONSE: The affirmative defenses have been asserted by my attorney.

17. Identify all documents which reference in any way the training provided to you during your tenure as a Metropolitan Police Officer.

RESPONSE: See Exhibit 1.

18. Please state your specific duties on the date in which the incident occurred, including your specific assignment, to whom you were to report, the name of all the officers who were working with you on the day of question, the vehicle assigned to you, your duty hours for that day and what specific duties were you performing at the time of the incident.

RESPONSE: The Defendant objects to this Interrogatory as it is unclear which officers plaintiff is inquiring about. Subject to and without waiving the above objection, on the night of the incident I was working a regular patrol with Officer Jarboe, my training officer. I was to report Sergeant Suber and Officer Jarboe. Please refer to Interrogatory number 5 for the names of all officers I was working with on the night in question. I don't remember the vehicle number but it was a DC cruiser, my hours were 2300-0730,

19. Describe in detail the basis for your 1) detention of any plaintiff, 2) handcuffing of any plaintiff and 3) arrest of any plaintiff, and in doing so please identify any and all reports, notes, or documentation of any kind that memorializes the referenced events and reasons stated.

RESPONSE: I did not detain or handcuff any of the plaintiffs. My only involvement in the arrest was that I completed the front page of the 163 and I signed it.

20. If it is your contention that you did not detain, handcuff or arrest any plaintiff during the incident which is the subject of this lawsuit, identify all person(s) who you contend engaged in the foregoing, providing their full name, rank, and business address.

RESPONSE: See my answer to Interrogatory 19.

21. Please describe in detail the facts and circumstances surrounding how you came to enter the residence located at 115 Anacostia Road, N.E., Washington, D.C.

RESPONSE: See my answer to Interrogatory 2.

22. If it is your contention that you did not enter the residence identified above, identify all person(s) who you contend entered the residence, providing their full name, rank and business address.

RESPONSE: I did enter the house.

I have read the foregoing answers to interrogatories, and they are true to the best of my knowledge, information, and belief

/s/ Faraz Khan
FARAZ KHAN

SWORN AND SUBSCRIBED before me, a Notary Public, this 22nd day of March 2010.

/s/ [Illegible]
Notary Public D.C.

My Commission Expires: March 31, 2010

[Counsel's Signature Block and
Certificate of Service Omitted in Printing.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/01/11]

Civil Action No. 09-571 (RMC)

THEODORE WESBY, *et al.*,

Plaintiff,

v.

DISTRICT OF COLUMBIA *et. al.*,

Defendants.

DEFENDANT ANDRE PARKER'S RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. Prc. 33, Defendant Andre Parker, having been first duly sworn under oath, upon information and belief, gives the following answers to interrogatories propounded to defendant by plaintiff:

(a) Defendant reserves the right to amend, revise, or supplement its answers to these interrogatories if and when new or different information becomes available.

(b) For any additional responsive information made available through deposition testimony, the defendant incorporates such information for the purpose of giving the plaintiff notice that such information exists, but does not adopt such testimony as accurate and, complete.

(c) Defendant, in accordance with Fed R. Civ. Pro. 33(d), may refer plaintiffs to the documents attached

hereto in order to answer these interrogatories when such answer "maybe derived or ascertained" from the document[s] and "the burden of deriving or ascertaining the answer is substantially the same" for both parties.

(d) Defendant objects to the production of any information that is protected by the attorney-client privilege; deliberative process -privilege, work product doctrine or any similarly recognized privilege, Inadvertent production of any information or documents so privileged does not constitute a waiver of such privilege or any grounds for grounds for objecting to the discovery request.

(e) Defendant objects to any part of the Plaintiffs' instruction that seeks to impose any discovery requirements outside the scope of the rules, especially any obligation to produce information not in the Defendant's control or not currently known to its attorneys after reasonable inquiry.

INTERROGATORIES

1. Please fully state your full name, date of birth, martial status, social security number, business address and residential address for the last five years, and your spouse's name.

RESPONSE: The defendant objects to this Interrogatory to the extent that it seek my residential address for the last five years and my social security number because such information is an unwarranted invasion of my privacy. Subject to and without waiving the above objections, I answer this interrogatory as follows: my name is Andre Carlos Parker, single, and my businesses address is 100 42nd St NE Washington, DC 20019.

2. Give a concise statement of the facts surrounding the arrest of the plaintiffs as you contend it occurred. In answering, please identify each and every document utilized, review or relied upon to respond or which allegedly supports the representations in your response, and specifically identify the individual answering this interrogatory.

RESPONSE: I was on routine patrol when I heard a radio transmission to assistant MPO Phifer at 115 Anacostia Road, NE. Washington. MPO Phifer notified the dispatcher that he needed assistance because there were people inside the premises. Upon arriving to the scene I proceeded to go to the back door of the premises to secure the premises of the house. As I entered the back door I observed all of the individuals sitting on the floor in the living room. I observed some individuals holding cups of liquor and beer and there were cups of liquor and beer on the floor. I could also smell marijuana. I also observed female provocatively dressed with dollars bills in a garter belt around their leg. All individuals were asked who the owner of the house was and where the owner was. I then spoke with one of the females who told me that a woman by the name of "Peaches" was renting the house from the grandson of the owner who had recently passed away and that he had given permission for all individuals to be in the house. I do not recall the name of the female who told me that but she is depicted in one of the pictures that were taken that evening. This woman used her cell phone and called "Peaches." I spoke to "Peaches" who said that she had just left the house to go to the store. I asked "Peaches" to return to the house but she refused to do so because she stated that she would be arrested. I asked "Peaches" who gave her permission to be in the house and she told me that I could confirm it with the grandson. I then spoke to the

owner and he told me that the individuals in the house did not have permission to be there. Then owner did not tell me that "Peaches" had a right to be in the house. I relayed this information to Sgt. Suber. At that point the decision was made to arrest all those present for unlawful entry. It was stated that because it was not clear who the owner of the house was and whether or not permission was given to the individuals to be in the house at the time of the occurrence Sergeant Suber ordered that all individuals be arrested.

3. For each plaintiff, detail each and every illegal act that you observed him or her engage in In answering, state with specificity where each identified plaintiff was located at the time that he/she was engaged in the illegal conduct alleged and all evidence that you collected in support of the alleged illegal conduct.

RESPONSE: Each of the plaintiffs was arrested for unlawful entry.

4. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who claim that they witnessed all or part of the incident referenced in the complaint, or who were near or at the scene at the time of the occurrence. State concisely but completely what such persons claim to have witnessed.

RESPONSE: I did not question any of the police officers or officials as to what they observed, and therefore, I don't know what they claimed to have witnessed. To the best of my recollection the only people known to me who would have personal knowledge would be the police officers and officials on the scene.

I do not know any of their homes addresses or telephone numbers. All of the police officers and officials on the scene were from the Sixth District.

5. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who arrived at the scene within one (1) hour after the occurrence. State concisely but completely of what such persons claim to have witnessed.

RESPONSE: Defendant objects to this Interrogatory to the extent that request that I disclose the home address and telephone numbers of all persons who arrived on the scene within one (1) hour after the Occurrence because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to personal knowledge of the occurrence. Subject to and without waiving the above objection, Sergeant Suber, Detective Spevulda, Officer Barnes arrived at the scene within one hour after the occurrence and their business address is 100 42nd St NE Washington DC 20019; (202) 698-0880. There were other officers and/or officials on the scene but I don't remember their names. I don't know what they claimed to have witnessed.

6. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who are known by you to have, or have claimed to have, personal knowledge or information of relevant facts which may pertain to the cause of the occurrence. State concisely but completely the nature of such personal knowledge or information.

RESPONSE: Defendant objects to this Interrogatory to the extent that I am asked to disclose the home address and telephone numbers of all persons who have or claimed to have personal knowledge or information of the facts of this case because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to personal knowledge or information of the facts of the occurrence. Subject to and without waiving the above objection, I don't know who claims to have personal knowledge or information of relevant facts which may pertain to the cause of the occurrence.

7. Have any of the persons whose names were furnished in response to any of the foregoing Interrogatories, or anyone else, made or given to you any statement or report concerning the incident which is the subject of this lawsuit? If the Answer is in the affirmative, state the name, home address, home telephone number, occupation, business address and business telephone number of each such person who made or gave such statement or report, the dates thereof, the content of each such statement, whether it was written or reduced to writing and the names and addresses of any and all persons in custody of possession thereof. Please attach a copy of the same to your Answers.

RESPONSE: No one has given me a statement and I am not aware of any statements that exist.

8. State the name, present home address, occupation and business address of any and all Persons who made an investigation to ascertain any fact relevant to the issues in this case, including particularly, but not exclusively, all investigators, officers, detectives,

police officials, experts and/or specialists. State concisely but completely the facts ascertained. If you will do so without a Request for Production, please attach a copy of any resulting reports(s) to your Answers.

RESPONSE: The Defendant objects to this Interrogatory to the extent that it seeks irrelevant or inadmissible information, or information not likely to lead to the discovery of relevant or admissible evidence. Defendant further objects to this Interrogatory to the extent that it requests that I disclose the home address of persons who investigated the facts at issue in this case because providing such information is an unwarranted invasion of privacy. In any event, I do not know what investigation this Interrogatory is referencing. I do not have in my custody or possession any investigative reports. Subject to and without waiving the above objection, to the best of my knowledge there was no investigation or interviews done other that what was conducted on the scene?

9. Did any of the plaintiffs make or give to you, or your agents or representatives, any statement or report concerning the occurrences referred to in the complaint or concerning any fact pertaining to any issue in this case? If the answer is in the affirmative, state when, where and to whom such statement (s) was/were made or given, whether or not it is in writing, the content of such statement, the name, home address, home telephone number, occupation, business address and business telephone number of any and all persons who have the original, and attach a copy thereof to your answers.

RESPONSE: None of the plaintiffs gave me a statement or a report concerning the occurrence referred to in the complaint or concerning any fact pertaining to any issue in this case.

10. Have you engaged any expert(s) whom you intend to call as witness(es) at trial, whether in anticipation for trial, preparation for litigation, or for any other purpose contemplated to obtain opinions, advice or information regarding facts or issues relevant to this case? If yes, state: (a) the names home addresses, occupation and business addresses of said expert(s), (b) whether any report, oral or written, has bee obtained from said experts(s), (c) furnish the dates thereof, (d) attach here a copy of said written reports(s), and (e) state the contents of any and all oral reports from said expert(s) as to the finding and opinions of the said expert.

RESPONSE: I have not-engaged any expert(s) whom I intend to call as witness(es) at trial.

11. Do you have within your possession or control, or do you have knowledge of any photograph, picture, audio recording, motion picture, plats or diagrams of the scene, the plaintiff(s) or other items which pertain in any way to the occurrence alleged in plaintiffs' complaint? If the answer to this Interrogatory is in the affirmative in any way, fully identify the item or items in your possession.

RESPONSE: I did not take any pictures nor do I have any pictures in my possession or control, I know that there were pictures taken. Based on information and belief, those pictures were produced by the District of Columbia in its initial disclosures.

12. Identify each of the police officer, including supervisors, who responded to the scene which is the subject of this lawsuit. For each of the identified officers, please provide the following information:

a. His/Her rank, assignment location, and duties on the scene;

b. Whether or not he/she assisted in the arrest of the plaintiffs

RESPONSE: Please refer to Interrogatory number 5 for the names and rank of all police officers and supervisors who responded to the scene. For all identified officers and supervisors. Based on information and belief, all of the officers and officials on the scene were assigned to the 6D that evening. I do not know their, duties on the scene. Officers Kahn and Newman made arrest.

13. Identify any and all lawsuits and/or disciplinary proceedings of any kind in which you have been involved in, in any way, during your tenure with the Metropolitan Police Department and state in detail the nature of the disciplinary proceedings and/or lawsuit, the date of the disciplinary proceeding or lawsuit was filed, the allegations asserted therein, the outcome of the disciplinary proceedings or lawsuit, the name of all parties to the lawsuit, the forum and/or court in which the disciplinary proceeding or lawsuit was filed and the outcome of the proceeding, indicating whether the proceeding is still pending.

RESPONSE: [redacted]

14. Identify any and all instances wherein you have been the subject of any complaint(s) lodged by citizens during his tenure with the Metropolitan Police Department and state in detail the nature of the complaint, the date of the complaint was lodged, the allegations asserted therein, the outcome of any proceedings related thereto, the name of the complaining party, indicating whether the complaint is still pending and identify any and all documents which relate in any way to each such proceeding(s) or complaint(s).

RESPONSE: [redacted]

15. Identify all reports, memorandums, notes, investigations or writings of any kind which refer to any stop, detention, assault and/or arrest of any of the plaintiffs, including but not limited to, the date of the document, author of the document, the recipient of the document and the subject matter of the document. Please produce all such documents.

RESPONSE: Prior to the incident I had no knowledge of any of the plaintiffs. As a result of the events of March 14-15, 2008 the only reports I am aware of are the PD 163's. Based on information and belief, the PD 163's was included in the District of Columbia's initial disclosures.

16. State with specificity the factual basis of your answer's affirmative defenses.

RESPONSE: I do not remember detaining or handcuffing anyone on the night of the incident. Further, the affirmative defenses have been asserted by my attorney.

17. Identify all documents which reference in any way the training provided to you during your tenure as a Metropolitan Police Officer.

RESPONSE: See Exhibit 1, attached hereto.

18. Please state your specific duties on the date in which the incident occurred, including your specific assignment, to whom you were to report, the name of all the officers who were working with you on the day of question, the vehicle assigned to you, your duty hours for that day and what specific duties were you performing at the time of the incident.

RESPONSE; On the day of the incident I was working out of 6D on the power shift on regular patrol, I was to

report to Sergeant Matthews, I was assigned to a DC cruiser; my tour of duty was 1930-0400.

19. Describe in detail the basis for your 1) detention of any plaintiff, 2) handcuffing of any plaintiff and 3) arrest of any plaintiff, and in doing so please identify any and all reports, notes, or documentation of any kind that memorializes the referenced events and reasons stated.

RESPONSE: I do not remember detaining, handcuffing or arresting anyone on the night of the incident.

20. If it is your contention that you did not detain, handcuff or arrest any plaintiff during the incident which is the subject of this lawsuit, identify all person(s) who you contend engaged in the foregoing, providing their full name, rank, and business address.

RESPONSE: I do not know who would have detained, handcuffed of the plaintiff's on the night of the incident.

21. Please describe in detail the facts and circumstances surrounding how you came to enter the residence located at 115 Anacostia Road, N.E., Washington, D.C.

RESPONSE: See answer to Interrogatory 2, above.

22. If it is your contention that you did not enter the residence identified above, identify all person(s) who you contend entered the residence, providing their full mime, rank and business address.

RESPONSE: I did enter the house on the night of the incident.

I have read the foregoing answers to interrogatories, and they are true to the best of my knowledge, information, and belief.

/s/ Andre Parker
ANDRE PARKER

SWORN AND SUBSCRIBED before me a Notary Public, this 17th day of March 2010.

/s/ Dawne Daye
Notary Public, D.C.

My Commission Expires:
DAWNE RHONDA DAYE
NOTARY PUBLIC DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES JANUARY 31, 2014

[Counsel's Signature Block and
Certificate of Service Omitted in Printing.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/01/11]

Civil Action No. 09-571 (RMC)

THEODORE WESBY, *et al.*,

Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

DEFENDANT JASON NEWMAN'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. Pro. 33, Defendant Jason Newman, having been first duly sworn under oath, upon information and belief, gives the following answers to interrogatories propounded to defendant by plaintiff:

(a) Defendant reserves the right to amend, revise, or supplement its answers to these interrogatories if and when new or different information becomes available.

(b) For any additional responsive information made available through deposition testimony, the defendant incorporates such information for the purpose of giving the plaintiff notice that such information exists, but does not adopt such testimony as accurate and complete.

(c) Defendant, in accordance with Fed R. Civ. Pro. 33(d), may refer plaintiffs to the documents attached hereto in order to answer these interrogatories when such answer "maybe derived or ascertained" from the document[s] and "the burden of deriving or ascertaining the answer is substantially the same" for both parties.

(d) Defendant objects to the production of any information that is protected by the attorney-client privilege, deliberative process privilege, work product doctrine or any similarly recognized privilege. Inadvertent production of any information or documents so privileged does not constitute a waiver of such privilege or any grounds for grounds for objecting to the discovery request.

(e) Defendant objects to any part of the Plaintiff's instruction that seeks to impose any discovery requirements outside the scope of the rules, especially any obligation to produce information not in the Defendant's control or not currently known to its attorneys after reasonable inquiry.

INTERROGATORIES

1. Please fully state your full name, date of birth, martial status, social security number, business address and residential address for the last five years, and your spouse's name.

RESPONSE: The Defendant objects to this Interrogatory to the extent that it seeks irrelevant or inadmissible information, or information not likely to lead to the discovery of relevant or admissible evidence. Further the defendant objects to this Interrogatory to the extent that it seek my residential address, marital status, my date of birth, and my social security number because such information is an

unwarranted invasion of my privacy. Subject to and without waiving the above objections, I answer this interrogatory as follows: my name is Jason Newman and, my business address is 100 42nd St NE Washington, DC 20019.

2. Give a concise statement of the facts surrounding the arrest of the plaintiffs as you contend it occurred. In answering, please identify each and every document utilized, review or relied upon to respond or which allegedly supports the representations in your response, and specifically identify the individual answering this interrogatory.

RESPONSE: Upon arriving to the scene I first went around to the back of the house to make sure that nobody ran out the back door. I then heard an officer state that other officers had gained entry to the house. At that point I returned to the front of the house and entered the first floor. While other officers were speaking to individuals in the first floor, myself and other officers went upstairs to see if anybody was there. One male was found hiding in the closet, one female may have been in the bathroom and another female was just standing in the bedroom. We then asked these individuals to go down stairs and they did. At that point, I went outside while other officers spoke with the people in the house. Sergeant Suber arrived on the scene and it was explained to him what was going on. I do recall officers asking who lived in the house but the individuals were not able to answer the questions. Sergeant Suber then made the decision to have the individuals arrested for unlawful entry.

3. For each plaintiff; detail each and every illegal act that you observed him or her engage in. In answering, state with specificity where each identified plaintiff was located at the time that he/she was engaged in

the illegal conduct alleged and all evidence that you collected in support of the alleged illegal conduct.

RESPONSE: Each of the plaintiffs was arrested for unlawful entry.

4. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who claim that they witnessed all or part of the incident referenced in the complaint, or who were near or at the scene at the time of the occurrence. State concisely but completely what such persons claim to have witnessed.

RESPONSE: I did not question any of the police officers or officials as to what they observed, and therefore, I don't know what they claimed to have witnessed. To the best of my recollection the only people known to me who would have personal knowledge would be the police officers and officials on the scene. I do not know any of their homes addresses or telephone numbers. All of the police officers and officials on the scene were from the Sixth District.

5. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who arrived at the scene within one (1) hour after the occurrence. State concisely but completely of what such persons claim to have witnessed.

RESPONSE: The Defendant objects to this Interrogatory to the extent that it seeks irrelevant or inadmissible information, or information not likely to lead to the discovery of relevant or admissible evidence. Defendant objects to this Interrogatory to the extent that it requests that I disclose the home address and telephone numbers of all persons who arrived on the

scene within one (1) hour after the occurrence because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to have personal knowledge of the occurrence. Subject to and without waiving the above objection, Officer Campanale, Officer khan, Officer Parker, Sergeant Suber, Officer Jarboe, MPO Phifer, Officer Espinosa, arrived at the scene within one hour after the occurrence and their business address is 100 42nd St NE Washington DC 20019; (202) 698-0880. There may have been other officers and/or officials on the scene but I do not remember who they may have been. I do not know what they claimed to have witnessed.

6. State the name, home address, home telephone number, occupation, business address and business telephone number of all persons known to you who are known by you to have, or have claimed to have, personal knowledge or information of relevant facts which may pertain to the cause of the occurrence. State concisely but completely the nature of such personal knowledge or information.

RESPONSE: Defendant objects to this Interrogatory to the extent that I am asked to disclose the home address and telephone numbers of all persons who have or claimed to have personal knowledge or information of the facts of this case because providing such information is an unwarranted invasion of privacy. In any event, I do not know the home addresses and telephone numbers of those who may claim to have personal knowledge or information of the facts of the occurrence. Subject to and without waiving the above objection, the only individuals I am aware of having any information are the officials who I named in Interrogatory number 5 who were on the scene. Please

refer to Interrogatory number 5 for the list of names and addresses. I do not know what knowledge or information they may have.

7. Have any of the persons whose names were furnished in response to any of the foregoing Interrogatories, or anyone else, made or given to you any statement or report concerning the incident which is the subject of this lawsuit? If the Answer is in the affirmative, state the name, home address, home telephone number, occupation, business address and business telephone number of each such person who made or gave such statement or report, the dates thereof, the content of each such statement, whether it was written or reduced to writing and the names and addresses of any and all persons in custody of possession thereof. Please attach a copy of the same to your Answers.

RESPONSE: No one has given me a statement.

8. State the name, present home address, occupation and business address of any and all persons who made an investigation to ascertain any fact relevant to the issues in this case, including particularly, but not exclusively, all investigators, officers detectives, police officials, experts and/or specialists. State concisely but completely the facts ascertained. If you will do so without a Request for Production, please attach a copy of any resulting reports(s) to your Answers.

RESPONSE: Defendant objects to this Interrogatory to the extent that it requests I disclose the home address of persons who investigated the facts at issue in this case because providing such information is an unwarranted invasion of privacy. In any event, I do not know what investigation this Interrogatory is referencing. I do not have in my custody or possession any investigative reports.

9. Did any of the plaintiffs make or give to you, or your agents or representatives, any statement or report concerning the occurrences referred to in the complaint or concerning any fact pertaining to any issue in this case? If the answer is in the affirmative, state when, where and to whom such statement(s) was/were made or given, whether or not it is in writing, the content of such statement, the name, home address, home telephone number, occupation, business address and business telephone number of any and all persons who have the original, and attach a copy thereof to your answers.

RESPONSE: None of the plaintiffs gave me a statement or a report concerning the occurrence referred to in the complaint or concerning any fact pertaining to any issue in this case.

10. Have you engaged any expert(s) whom you intend to call as witness(es) at trial, whether in anticipation for trial, preparation for litigation, or for any other purpose contemplated to obtain opinions, advice or information regarding facts or issues relevant to this case? If yes, state: (a) the names home addresses, occupation and business addresses of said expert(s), (b) whether any report, oral or written, has bee obtained from said experts(s), (c) furnish the dates thereof, (d) attach here a copy of said written reports(s), and (e) state the contents of any and all oral reports from said expert(s) as to the finding and opinions of the said expert.

RESPONSE: I have not engaged any expert(s) whom I intend to call as witness(es) at trial.

11. Do you have within your possession or control, or do you have knowledge of any photograph, picture, audio recording, motion picture, plats or diagrams of the scene, the plaintiff(s) or other items which pertain

in any way to the occurrence alleged in plaintiffs' complaint? If the answer to this Interrogatory is in the affirmative in any way, fully identify the item or items in your possession.

RESPONSE: I did not take any pictures nor do I have any pictures in my possession or control. Officer Campanale did take pictures. Based on information and belief, those pictures were produced by the District of Columbia in its initial disclosures.

12. Identify each of the police officer, including supervisors, who responded to the scene which is the subject of this lawsuit. For each of the identified officers, please provide the following information:

a. His/Her rank, assignment location, and duties on the scene;

b. Whether or not he/she assisted in the arrest of the plaintiffs

RESPONSE: Please refer to Interrogatory number 5 for the names and rank of all police officers and supervisors who responded to the scene. For all identified officers named I do not know their assignment location, duties on the scene or whether or not they assisted in the arrest of plaintiffs.

13. Identify any and all lawsuits and/or disciplinary proceedings of any kind in which you have been involved in, in any way, during your tenure with the Metropolitan Police Department and state in detail the nature of the disciplinary proceedings and/or lawsuit, the date of the disciplinary proceeding or lawsuit was filed, the allegations asserted therein, the outcome of the disciplinary proceedings or lawsuit, the name of all parties to the lawsuit, the forum and/or court in which the disciplinary proceeding or lawsuit

was filed and the outcome of the proceeding, indicating whether the proceeding is still pending.

RESPONSE: I have never been the subject of a lawsuit. I did receive a letter of reprimand for not staying within my specific assigned area.

14. Identify any and all instances wherein you have been the subject of any complaint(s) lodged by citizens during his tenure with the Metropolitan Police Department and state in detail the nature of the complaint, the date of the complaint was lodged, the allegations asserted therein, the outcome of any proceedings related thereto, the name of the complaining party, indicating whether the complaint is still pending and identify any and all documents which relate in any way to each such proceeding(s) or complaint(s).

RESPONSE: I have never had any complaints lodge by citizens against me during my tenure with the Metropolitan Police Department.

15. Identify all reports, memorandums, notes, investigations or writings of any kind which refer to any stop, detention, assault and/or arrest of any of the plaintiffs, including but not limited to, the date of the document, author of the document, the recipient of the document and the subject matter of the document. Please produce all such documents.

RESPONSE: Prior to the night of the incident I had no knowledge of any of the plaintiffs. As a result of the events of March 15, 2008, the only reports I am aware of are the PD 163's. Based on information and belief, the PD 163 I completed and the PD 163's completed by other police officers were included in the District of Columbia's initial disclosures.

16. State with specificity the factual basis of your answer's affirmative defenses.

RESPONSE: I do not remember detaining or handcuffing anyone on the night of the incident. Further, the affirmative defenses have been asserted by my attorney.

17. Identify all documents which reference in any way the training provided to you during your tenure as a Metropolitan Police Officer.

RESPONSE: See Exhibit 1.

18. Please state your specific duties on the date in which the incident occurred, including your specific assignment, to whom you were to report, the name of all the officers who were working with you on the day of question, the vehicle assigned to you, your duty hours for that day and what specific duties were you performing at the time of the incident.

RESPONSE: The Defendant objects to this Interrogatory as it is unclear as to which officers plaintiffs are inquiring about. Subject to and without waiving the above objection, on the night of the incident I was working a regular patrol. I was to report Sergeant Mathews. Please refer to Interrogatory number five for the names of all officers I was working with on the night in question. I don't remember the vehicle number but it was a DC Cruiser, my hours were 1930-0400, at the time of the incident I was on patrol.

19. Describe in detail the basis for your 1) detention of any plaintiff, 2) handcuffing of any plaintiff and 3) arrest of any plaintiff, and in doing so please identify any and all reports, notes, or documentation of any kind that memorializes the referenced events and reasons stated.

RESPONSE: I do not remember detaining or handcuffing anyone on the night of the incident. I was ordered to make an arrest by Sergeant Suber.

20. If it is your contention that you did not detain, handcuff or arrest any plaintiff during the incident which is the subject of this lawsuit, identify all person(s) who you contend engaged in the foregoing, providing their full name, rank, and business address.

RESPONSE: I do not contend that I did not make an arrest.

21. Please describe in detail the facts and circumstances surrounding how you came to enter the residence located at 115 Anacostia Road, N.E., Washington, D.C.

RESPONSE: See Interrogatory 2, above.

22. If it is your contention that you did not enter the residence identified above, identify all person(s) who you contend entered the residence, providing their full name, rank and business address.

RESPONSE: I do not contend that I did not enter the house.

I have read the foregoing answers to interrogatories, and they are true to the best of my knowledge, information, and belief.

/s/ Jason Newman
JASON NEWMAN

SWORN AND SUBSCRIBED before me, a Notary Public, this 18th of March, 2010.

/s/ [Illegible]
Notary Public, D.C.

My Commission Expires: 2/28/14

[Counsel's Signature Block and
Certificate of Service Omitted in Printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 04/18/11]

Civil Action No. 09-501 (RLW)

THEODORE WESBY, *et al.*,

Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' ALLEGED FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Come now the plaintiffs, by and through counsel, and hereby submit their response to Defendants' Alleged Material Facts As To Which There Is No Genuine Dispute.

1. Defendant District of Columbia is a municipal corporation organized pursuant to the laws of the United States Complaint at ¶ 24.

Admitted.

2. Officer Edwin Espinosa was at all times relevant to this proceeding a Metropolitan Police Officer acting within the course and scope of his authority. Complaint at ¶ 19.

Admitted.

3. Officer J. New man was at all times relevant to this proceeding a Metropolitan Police Officer acting within the course and scope of his authority, Complaint at ¶ 20.

Admitted.

4. Officer A. Campanale was at all times relevant to this proceeding a Metropolitan Police Officer acting within the course and scope of his authority. Complaint at ¶ 21.

Admitted.

5. Officer A. Parker was at all times relevant to this proceeding a Metropolitan Police Officer acting within the course and scope of his authority. Complaint at ¶ 22.

Admitted.

6. Officer F. Kahn was at all times relevant to this proceeding a Metropolitan Police Officer acting within the course and scope of his authority. Complaint at ¶ 23.

Admitted.

7. The Complaint purports to sue individual MPD officers in their individual and official capacities. Complaint at ¶19-23.

Plaintiffs' complaint does not "purport" to do anything. The complaint specifically indicates that the defendant police officers are being sued in both their official and individual capacities.

8. On Saturday March 16 2009, all Plaintiffs were at a social gathering at 115 Anacostia Road. N.E. in Washington. D.C. Complaint at 25.

Plaintiffs' complaint at ¶ 25 actually states "plaintiffs were attending a bachelor party at 115 Anacostia Rd., N.E., in Washington, D.C."

9. No Plaintiff alleges that he or she were overnight guests of the owner or lessee of the premises at 115 Anacostia Road, N.E.

Admitted.

10. MPD received information from neighbors of 115 Anacostia Road. N.E. that the residence was vacant. Dex. "O" (Affidavit of Randy Keck); DEx. "C" (Statement of K.A. Walters); and DEx. "A" (Arrest Report); DEx Campanale Interrog. at 2-3.

Defendants' Exhibit O is an undated affidavit of Randy Keck that was apparently faxed to defendants' counsel. What is significant about this document is the fact that it indicates that Mr. Keck "thought" that the property was vacant, Affidavit at 1, and it fails to support in any way the suggestion that he provided information in this regard to the MPD at any time prior to the arrests of the plaintiffs. Defendants' Exhibit C is an unsigned, undated alleged police report from somebody with "Walters" in their name. In actuality defendants' Exhibit C is nothing more than inadmissible hearsay. An unsworn document that constitutes inadmissible hearsay, which defendants' Exhibit O most certainly is, may not be used in support of a motion for summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970); *Bush v. District of Columbia*, 595 F.3d 384, 387 (D.C. Cir. 2010). Similarly, defendants' Exhibit A, which is the alleged arrest report for one of the plaintiffs, although the name of the person arrested has been redacted for

some odd reason, constitutes nothing more than inadmissible hearsay and it too may not be used to support a motion for summary judgment. *Id.*

11. At about 2.00 A M.. on March 16 2008. uniformed MPD officers arrived at 115 Anacostia Rd. N.E. Washington D.C. where Plaintiffs were located. Complaint at 26.

The plaintiffs have no idea when uniformed MPD Officers arrived at 115 Anacostia Rd., N.E., nor does their complaint state otherwise at ¶ 26. What is alleged in their complaint is that officers began to loudly bang on the door at approximately 2:00 a.m. and then they entered the premises brandishing their firearms. More importantly, however, this alleged fact is not even remotely material to any of the issues before the Court.

12. Several MPD Officers went to the back of the house at 115 Anacostia Road prior to entry of the premises by MPD Officers at the liont of the house for security reasons or if someone may run out the back. DEx. (Parker Dep. 9:12-19).

The plaintiffs admit that Officers went to the back of the residence, however, this alleged fact is not even remotely material to any of the issues before the Court.

13. MPD Officers Phifer and Defendant MPD Officer Edwin Espinosa heard loud music coming from inside of 115 Anacostia Road. N.E. even though the residence was reported to be vacant Dex "A" (Arrest Report).

This alleged fact is once again supported by inadmissible hearsay. Moreover, Officer Edwin Espinosa

does not mention hearing any loud music in his deposition. Espinosa Interrogatory Ans. 2 (Defendants' Exhibit Q); Espinosa Dep at 8 (Plaintiffs' Exhibit 4).

14. MPD Officers Phifer and Defendant MPD Officer Edwin Espinosa knocked heavily on the front door, at which time the door became ajar. DEx, "A" (Arrest Report): DEx. "Q" Espinosa Interrog. at 3.

Defendants' Exhibit A is inadmissible and meaningless hearsay. As to the suggestion that Officer Espinosa supports the alleged material fact, the defendants are not being honest. First of all, Officer Espinosa discusses "knocking on the door" in response to interrogatory 2, not 3. And what he says is "MPO Phifer approached the premises and knocked on the door. An individual opened the door and I could see people in the house scattering into different rooms." Defendants' Exhibit Q. Obviously the adjectives were added by counsel and the representation that the door "became ajar," was simply made up.

15. MPD Officers entered 115 Anacostia Road. N.E. through the open door and observed several females dressed in thongs, g-strings, and bras. The women had U.S. currency attached to an elastic band strapped to some of their legs. DEx. "B" (Photographs).

This alleged fact is neither relevant nor material to any of the issues before the Court as each of the defendant Officers has testified that no illegal conduct was observed. Plaintiffs' Exhibits 4, 5, 6, 7, & 8

16. Plaintiff Chittams did not see the MPD Officers enter the house. At the time the police arrived. Chittams was upstairs in a bedroom with Brittany (Brown) and Hunt. DEx. "G" (Chittams Dep. 29-30, 33); DEx. "P" Campanale Interrog. at 3; DEx. "R" Khan Interrog. at 3; DEx. "S" Parker interrog. at 3.

This alleged fact is neither relevant nor material to any of the issues before the Court.

17. Plaintiff Chittams states in her deposition that Plaintiff Taylor was also upstairs in a separate bedroom at the time the police entered. DEx. 'G (Chittams Dep. 29:18-21; 30: 1-5).

This alleged fact is neither relevant nor material to any of the issues before the Court.

18. Plaintiff Chittams states in her deposition that Plaintiffs Louis and Davis were also upstairs at. the time the police entered. DEx. "G" (Chittams Dep. 33:1-8); DEx. "I" Newman Interrog. at 3.

This alleged fact is neither relevant nor material to any of the issues before the Court.

19. No Plaintiff has testified during discovery that they saw the MPD Officers enter the house or the method used to enter the house.

This alleged fact is neither relevant nor material to any of the issues before the Court.

20. Plaintiff Sanjah Hunt observed one Plaintiff (unknown) give a lap dance to another social visitor at 115 Anacostia Avenue N.E. prior to police arrival. DEx. "H" (Hunt Dep. 24:1 1).

This alleged fact is neither relevant nor material to any of the issues before the Court as each of the defendant Officers has testified that no illegal conduct was observed. Plaintiffs' Exhibits 4, 5, 6, 7, & 8.

21. Plaintiff Ethelbert Louis stated in deposition after he arrived at 115 Anacostia Road at about 1:00 p.m. the room was dark and he saw several women giving lap dances. DEx. "I" (Louis Dep. 27:1-5; 28:6-1 7).

This alleged fact is neither relevant nor material to any of the issues before the Court as each of the defendant Officers has testified that no illegal conduct was observed. Plaintiffs' Exhibits 4, 5, 6, 7, & 8

22. The observations made by the MPD officers while inside 115 Anacostia Road, N.E., was that actions consistent with strip clubs for profit were taking place.

Conspicuously, no reference is made to the part of the record that supports defendants' contention that the officers observed "that actions consistent with strip clubs for profit were taking place," even though LCvR 7(h)(1) requires that a material fact that the moving party contends there is no genuine issue regarding "shall include references to the parts of the record relied upon to support the statement." The reason for that is because the statement is not supported in the record. Apparently, the only basis for the statement is counsel for the defendants' personal opinion about this incident that she wished to share, which is entirely irrelevant.

23. A used condom was on a window sill at 115 Anaeostia Road, N.E. DEx. "D" (Photograph).

This alleged fact is neither relevant nor material to any of the issues before the Court.

24. MPD Officers smelled marijuana while at 115 Anacostia Road, N.E. Parker Dep. 14:1 7, DEx "P". Campanale Interrog at 3; DEx "T- Newman Interrog. at 3

This alleged fact is neither relevant nor material to any of the issues before the Court as each of the defendant Officers has testified that no illegal conduct was observed. Plaintiffs' Exhibits 4, 5, 6, 7, & 8

25. MPD Officers interviewed all of the persons on site at 115 Anacostia Road, N.E. DEx. "A" (Arrest Report).

This alleged fact is neither relevant nor material to any of the issues before the Court.

26. None of the people on-site at 115 Anacostia Road, N.E. admitted to be the owner of the property.

None of the plaintiffs own 115 Anacostia Road, N.E.

27. MPD Officers were told by some social guests at 115 Anacostia Road, N E that a woman named "Tasty" or "Peaches" owned or rented 115 Anacostia Road, N.E., and that she had given permission to hold a bachelor party on site that night. DEx. "G" (Chittams Dep. 12:1 1-21).

What Ms. Chittams actually said in her deposition on page 12 was that she had been to the house before with "Tasty." There was furniture in the house and it looked like somebody was just moving in when she was there before, and when she went there, "Tasty" had keys to the house so she assumed that she lived there.

28. None of the Plaintiffs knew who the bachelor was, and none of the Plaintiffs could give his name in depositions.

Conspicuously, no reference is made to the part of the record that supports defendants' contention even though LCvR 7(h)(1) requires that a material fact that the moving party contends there is no genuine issue regarding "shall include references to the parts of the record relied upon to support the statement." The reason for that is because the statement is in fact not supported in the record. Apparently, the only basis for the statement is counsel for the defendants' personal

opinion about this incident that she wished to share, which is entirely irrelevant.

29. With respect to the reason why she was at 115 Anaeostia Road, N.E., Plaintiff Stribling stated in her deposition that her then-boyfriend. Lynn Taylor. told her he "wanted to wish his friend well before he got married.- DEx. "J- (Stribling Dep 24:5-18).

This alleged fact is neither relevant nor material to any of the issues before the Court.

30. With respect to the reason why he was at 115 Anacostia Road, N.E., Lynn Taylor states in his deposition that he went to 115 Anacostia Road to see Natasha Chittams. DEx. "K" (Taylor Dep. 22:13-16) MPD Officer Parker spoke to Tasty on a cell phone provided by one of the occupants on the premises, and he asked Tasty to come to the premises. Parker Interrog. at 3.

What Mr. Taylor actually said in his deposition at page 22 was that he was going there to see his stepsister and that a bachelor party was going to be going on. Nonetheless, the alleged facts are neither relevant nor material to any of the issues before the Court.

31. With respect to the reason why she was at 115 Anacostia Road, N.E. Plaintiff Chittams says in her deposition that a girl named "Tasty," who she met at Irving's, a strip club where she and Tasty worked, told her that she was having a bachelor party for a friend of hers and that she needed Chittams to call girls to come to the party. DEx. "G" (Chittams Dep. 12:1 1-21; 13:1-10).

At no place on page 12 or 13 of Ms. Chittams deposition does she state that she met "Tasty" at a

strip club called Irving's. In addition, this alleged fact is neither relevant nor material to any of the issues before the Court.

32. With respect to the reason why she was at 115 Anacostia Road, N.E., Shanja Hunt states that Chittams asked her to come to the party to dance. Hunt Dep. 8:6-13.

This alleged fact is neither relevant nor material to any of the issues before the Court.

33. With respect to the reason why she was at 1 15 Anacostia Road, N.E., Alissa Cole states in deposition that she was told about the party by Britanny Brown. DEx. "L" (Cole Dep. 8:19-21 ; 9:1-4).

This alleged fact is neither relevant nor material to any of the issues before the Court.

34. With respect to money seen in the dancing girls' g-strings, according to Chittams deposition, she called girls to come to the bachelor party but informed them that they would not be paid simply for coming, but would be able to keep any tips they made for dancing. DEx "G" (Chittams Dep. 14:10-21).

This alleged fact is neither relevant nor material to any of the issues before the Court.

35. None of the Plaintiffs know Tasty's real name even though it is alleged that she invited Plaintiffs to the party.

Conspicuously, no reference is made to the part of the record that supports defendants' contention even though LCvR 7(h)(1) requires that a material fact that the moving party contends there is no genuine issue regarding "shall include references to the parts of the record relied upon to support the statement." The reason for that is because the statement is in fact not

supported in the record. Apparently, the only basis for the statement is counsel for the defendants' personal opinion about this incident that she wished to share, which is entirely irrelevant.

36. Tasty has not been deposed, made a declaration, taken an affidavit, intervened in this action, or otherwise came forth with proof of a possessory interest in 115 Anacostia Road, N.E.

Admitted. However, this alleged fact is neither relevant nor material to any of the issues before the Court.

37. Further research into D.C. real property assessments, deeds and mortgages public records indicated that on March 15, 2008, a man named Henry Hughes owned the premises at 115 Anacostia Avenue, N.E., until he sold it to Mid-Atlantic Development Company LLC on October 28, 2008. DEx. "E" (Public Record). Public records show that Mr. Hughes owned the premises since 2001. (Id.). No evidence elicited during discovery indicated that Hughes rented the premises to Tasty or that they had co-ownership.

This alleged fact is neither relevant nor material to any of the issues before the Court inasmuch as none of the information contained in the submitted Exhibit was known to the defendants on the date of plaintiffs' arrest. Nonetheless, a mere cursory reading of defendants' Exhibit E indicates that Henry Hughes, who supposedly owned the subject property on March 15, 2008, did in fact die on April 27, 2007. Thus, it is unclear how Mr. Henry Hughes could have owned it on March 15, 2008, as alleged by the defendants.

38. MPD Officers spoke with Mr. Hughes while they were at the 115 Anacostia premises on March 16, 2008, and Hughes told the police that he owned the

property, he was in the process of working out some type of lease agreement, but that he and Peaches never came to an agreement and the social guests did not have permission to be in that house. DEx. "F" (Parker Dep. 17:22; 18:1-18).

This contention is refuted by defendants' own Exhibit E which indicates that the owner of the property, Henry Hughes, died on April 27, 2007. However, this alleged fact is neither relevant nor material to any of the issues before the Court in any event.

39. MPD Officer Anthony Campanale took pictures at 115 Anacostia Road, N.E. to document the scene. DEx. "M" (Campanale Dep. 19:4-7).

This alleged fact is neither relevant nor material to any of the issues before the Court.

40. Investigations indicated to the MPD Officers that they had probable cause to place the individuals under arrest for unlawful entry. Nobody could determine who was supposed to be inside the residence. DEx. "M" (Campanale Dep. 35: 3-22).

As a matter of law, the fact that the defendants could not determine who was supposed to be in the house does not establish probable cause for an arrest for unlawful entry. *Bolger v. D.C.*, 608 F. Supp.2d 10, 18-19 (D.D.C. 2009).

41. MPD Officers arrested the social guests on-site at 115 Anacostia Road, N.E. on a charge of unlawful entry. DEx. A (Arrest report).

According to Sgt. Suber, he directed that the plaintiffs be arrested for unlawful entry, at the police station he was told that what the plaintiffs had been charged with was inappropriate. Therefore, the charge

of unlawful entry was dropped and the plaintiffs were then charged with disorderly conduct. Suber dep at 28-30, 39-42.

42. MPD Officers transported the people found on-site at 115 Anacostia Road, N.E. to the 6th District police station where a decision was made to change the arrest charge to disorderly conduct.

It is admitted that the plaintiffs' were subsequently charged with disorderly conduct even though no basis for that charge existed. Espinosa dep at 11, 22; Campanale dep at 41-42; Khan dep at 12, 16; Newman dep at 12, 24; Parker dep at 17, 20, 32, 34;Suber dep at 28-30, 39-43.

43. MPD Officers on the scene did not charge Plaintiffs with disorderly conduct. The MPD Officers received instructions from the day watch commander to change the charge from unlawful entry to disorderly conduct after they arrived at 6th District police station. DEx. "M" (Campanale Dep. 42:4-10). The Attorney General's Office called and advised MPD Officers to "lock them up for disorderly conduct. . ." DEx. "N" (Sgt. Suber Dep. 29:13:17; see also, id. at 40:21-22; 41 :1-20).

It is admitted that the plaintiffs' were subsequently charged with disorderly conduct even though no basis for that charge existed. Espinosa dep at 11, 22; Campanale dep at 41-42; Khan dep at 12, 16; Newman dep at 12, 24; Parker dep at 17, 20, 32, 34;Suber dep at 28-30, 39-43.

44. The defendant officers are listed as "Arresting Officer" on the corresponding PD-163 arrest forms. None of the defendant officers personally arrested or detained any of the plaintiffs. Campanale Interrog. at 10; Espinosa Interrog. at 9; Khan Interrog. at 10; Newman Interrog. at 9; Parker Interrog. at 10. None

of the defendant officers made the decision to arrest or detain any of the plaintiffs. Campanale Interrog. at 3; Espinosa Interrog. at 10; Khan Interrog. at 3; Newman Interrog. at 3; Parker Interrog. at 3-4.

The contention that none of the defendant officers "personally arrested or detained any of the plaintiffs," is simply untrue. In his deposition defendant Campanale testified as follows:

> Q In your interrogatories you say you don't know who detained, handcuffed or arrested any of the plaintiffs on the night of the incident. Does that indicate that you didn't arrest any of the plaintiffs in this case?
>
> A No, it doesn't indicate that.
>
> Q So which one of them did you arrest?
>
> A Like I stated before, I don't recall their specific names at this time.

Exhibit 5 at 37.

* * *

> Q What did you do with your arrest reports?
>
> A We turned them in.
>
> Q To who?
>
> A To the – well actually, they were turned in by officer – by MPO Phifer.
>
> Q So you gave your arrest reports to Phifer?
>
> A That's correct.

Exhibit 5 at 40-41.

In his deposition defendant Newman testified as follows:

> Q Do you know how many people were arrested?
>
> A No, sir.
>
> Q How many did you arrest?
>
> A I had one person.
>
> Q And who was that?
>
> A I believe his name was Louis Echelberg [phonetic], something like that.
>
> Q Ethelbert Louis?
>
> A Yes.

Exhibit 7 at 15-16.

According to Sgt. Suber, he directed that the plaintiffs be arrested for unlawful entry, at the police station he was told that what the plaintiffs had been charged with was inappropriate. Therefore, the charge of unlawful entry was dropped and the plaintiffs were then charged with disorderly conduct. Suber dep at 28-30, 39-42.

There is no single nor group of alleged undisputed material facts that come close to supporting defendants' motion for summary judgment.

Respectfully submitted,

/s/ Gregory L. Lattimer

Gregory L. Lattimer [371926]
1200 G Street, N.W.
Suite 800
Washington, D.C. 20005
Tel. (202) 638-0095
Counsel for the Plaintiffs

RECORD AND BRIEFS

No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

KARL A. RACINE
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress

QUESTIONS PRESENTED

Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants below, are the District of Columbia and two of its police officers, Andre Parker and Anthony Campanale. Petitioners had been named as defendants in the district court along with Edwin Espinosa, Jason Newman, and Faraz Khan.

Respondents, who were the appellees below, are Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Antoinette Colbert (as personal representative of the Estate of Ethelbert Louis), Gary Gordon, James Davis, Joseph Mayfield, Jr., Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Jr., and Stanley Richardson.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. Factual Background	2
B. District Court Proceedings	5
C. The Court of Appeals' Opinion	6
D. The Court of Appeals' Denial of Rehearing En Banc	10
SUMMARY OF ARGUMENT	12
ARGUMENT	15
I. Considered From The Perspective Of A Reasonable Officer On The Scene, The Totality Of The Circumstances Provided Probable Cause To Arrest Respondents For Trespassing	15
A. The officers had a reasonable basis on these facts to think that the partiers had committed trespass, and in particular that they knew or should have known they had no right to be in the home	16

TABLE OF CONTENTS—Continued

Page

1. The officers knew that the partiers lacked the right to be in the home, had obvious reasons to think their entry was unauthorized, and acted suspiciously 16

2. A reasonable officer could think the partiers' common enterprise with "Peaches" made their own guilt more likely, not less, and at least could discredit their claim of reliance on an invitation by this admitted trespasser 22

B. The court of appeals' errors of law made its version of probable cause too demanding, inflexible, and impractical 26

1. On-scene officers should not be held liable for failing to correctly and definitively resolve a suspect's claim of an innocent mental state 27

2. On-scene officers assessing probable cause should not have to apply a technical analysis or predict how courts will resolve complex legal issues 35

II. Alternatively, The Officers Are Entitled To Qualified Immunity Because The Law Was Not Clearly Established That An Arrest Under These Facts Lacked Probable Cause ... 42

CONCLUSION 50

TABLE OF AUTHORITIES

Cases	Page(s)
Abney v. United States, 616 A.2d 856 (D.C. 1992)	37
Adams v. Williams, 407 U.S. 143 (1972)	35
Anderson v. Creighton, 483 U.S. 635 (1987)	42, 47
Artisst v. United States, 554 A.2d 327 (D.C. 1989)	12, 46
Ashcroft v. al-Kidd, 563 U.S. 731 (2011)	48
Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)	38
Atwater v. City of Lago Vista, 532 U.S. 318 (2001)	31
Baker v. McCollan, 443 U.S. 137 (1979)	30
Bodzin v. City of Dall., 768 F.2d 722 (5th Cir. 1985)	29
Borgman v. Kedley, 646 F.3d 518 (8th Cir. 2011)	29
Bowman v. United States, 212 A.2d 610 (D.C. 1965)	39-40
Cabana v. Bullock, 474 U.S. 376 (1986)	38
Cartledge v. United States, 100 A.3d 147 (D.C. 2014)	17

TABLE OF AUTHORITIES—Continued

Page(s)

City & Cty. of S.F. v. Sheehan,
135 S. Ct. 1765 (2015) 50

Conner v. Heiman,
672 F.3d 1126 (9th Cir. 2012) 33

Considine v. Jagodinski,
646 F. App'x 283 (3d Cir. 2016) 29

Cox v. Hainey,
391 F.3d 25 (1st Cir. 2004) 28

Culp v. United States,
486 A.2d 1174 (D.C. 1985) 20, 37, 38, 45

Darab v. United States,
623 A.2d 127 (D.C. 1993) 37

Devenpeck v. Alford,
543 U.S. 146 (2004) 41

Dumbra v. United States,
268 U.S. 435 (1925) 24

Finigan v. Marshall,
574 F.3d 57 (2d Cir. 2009) 29, 48

Florida v. Harris,
133 S. Ct. 1050 (2013) ..... *passim*

Florida v. Jimeno,
500 U.S. 248 (1991) 15

Gaetano v. United States,
406 A.2d 1291 (D.C. 1979) 37

Gasho v. United States,
39 F.3d 1420 (9th Cir. 1994) 45

TABLE OF AUTHORITIES—Continued

Page(s)

Heien v. North Carolina,
135 S. Ct. 530 (2014) 36

Henderson v. Morgan,
426 U.S. 637 (1976) 18

Holman v. City of York,
564 F.3d 225 (3d Cir. 2009) 39

Hope v. Pelzer,
536 U.S. 730 (2002) 47

Hunter v. Bryant,
502 U.S. 224 (1991) 42

Illinois v. Gates,
462 U.S. 213 (1983) ..... *passim*

Illinois v. Wardlow,
528 U.S. 119 (2000) 21, 32-33

Jordan v. Mosley,
487 F.3d 1350 (11th Cir. 2007) 18

Kaley v. United States,
134 S. Ct. 1090 (2014) 15, 27

Kozlovska v. United States,
30 A.3d 799 (D.C. 2011) 45

Krause v. Bennett,
887 F.2d 362 (2d Cir. 1989) 28

Leiss v. United States,
364 A.2d 803 (D.C. 1976) 37

Liu v. Phillips,
234 F.3d 55 (1st Cir. 2000) 49

TABLE OF AUTHORITIES—Continued

Page(s)

Malley v. Briggs,
475 U.S. 335 (1986) 42

Marks v. Carmody,
234 F.3d 1006 (7th Cir. 2000) 30

Maryland v. Pringle,
540 U.S. 366 (2003) ..... *passim*

McDonnell v. United States,
136 S. Ct. 2355 (2016) 40

McFadden v. United States,
135 S. Ct. 2298 (2015) 30

McGloin v. United States,
232 A.2d 90 (D.C. 1967) 12, 37, 39, 46

Messerschmidt v. Millender,
565 U.S. 535 (2012) 49

Minch v. District of Columbia,
952 A.2d 929 (D.C. 2008) 42

Morissette v. United States,
342 U.S. 246 (1952) 30

Mullenix v. Luna,
136 S. Ct. 305 (2015) 43, 47

Nichols v. Woodward & Lothrop, Inc.,
322 A.2d 283 (D.C. 1974) 46

Ornelas v. United States,
517 U.S. 690 (1996) 29-30

TABLE OF AUTHORITIES—Continued

Page(s)

Ortberg v. United States,
81 A.3d 303 (D.C. 2013) 34, 39, 40

Paff v. Kaltenbach,
204 F.3d 425 (3d Cir. 2000) 28

Peters v. New York,
392 U.S. 40 (1968) 21, 25

Plumhoff v. Rickard,
134 S. Ct. 2012 (2014) 15

Prieto v. May Dep't Stores Co.,
216 A.2d 577 (D.C. 1966) 46

Ramirez v. City of Buena Park,
560 F.3d 1012 (9th Cir. 2009) 28

Safford Unified Sch. Dist. No. 1 v. Redding,
557 U.S. 364 (2009) 47

Saucier v. Katz,
533 U.S. 194 (2001) 43

Smith v. United States,
133 S. Ct. 714 (2013) 38, 39

Smith v. United States,
281 A.2d 438 (D.C. 1971) 37

Spiegel v. Cortese,
196 F.3d 717 (7th Cir. 2000) 45

Stewart-Veal v. District of Columbia,
896 A.2d 232 (D.C. 2006) 43

TABLE OF AUTHORITIES—Continued

Page(s)

Tillman v. Wash. Metro. Area Transit Auth., 695 A.2d 94 (D.C. 1997) 46-47

United States v. Aguilar, 515 U.S. 593 (1995) 18

United States v. Ameling, 328 F.3d 443 (8th Cir. 2003) 22

United States v. Anderson, 755 F.3d 782 (5th Cir. 2014) 29

United States v. Arvizu, 534 U.S. 266 (2002) 26, 32

United States v. Bailey, 444 U.S. 394 (1980) 40

United States v. Christian, 187 F.3d 663 (D.C. Cir. 1999) 45

United States v. Delreal-Ordones, 213 F.3d 1263 (10th Cir. 2000) 28

United States v. Iwuala, 789 F.3d 1 (1st Cir. 2015) 29

United States v. Garrett, 984 F.2d 1402 (5th Cir. 1993) 19

United States v. Jernigan, 341 F.3d 1273 (11th Cir. 2003) 28

United States v. Mousli, 511 F.3d 7 (1st Cir. 2007) 18

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Renner,
648 F.3d 680 (8th Cir. 2011)..... 28

United States v. Schene,
543 F.3d 627 (10th Cir. 2008)..... 28

United States v. Smith,
459 F.3d 1276 (11th Cir. 2006)..... 40

United States v. Thomas,
444 F.2d 919 (D.C. Cir. 1971)..... 37

United States v. Williams,
504 U.S. 36 (1992)..... 38

Whittlesey v. United States,
221 A.2d 86 (D.C. 1966)..... 36-37

Wilson v. Layne,
526 U.S. 603 (1999)..... 48

Wright v. City of Phila.,
409 F.3d 595 (3d Cir. 2005)..... 48

Wright v. West,
505 U.S. 277 (1992)..... 25, 30

Zimmerman v. Doran,
807 F.3d 178 (7th Cir. 2015)..... 29

Constitution

U.S. Const. amend. IV.....*passim*

TABLE OF AUTHORITIES—Continued

Statutes Page(s)

28 U.S.C. § 1254 1

42 U.S.C. § 1983 ..... 1, 5

42 U.S.C. § 1988 6

D.C. Code §§ 22-2713 to -2720 (2008)..... 21

D.C. Code § 22-3302 (2008)..... 2, 17, 20, 36

D.C. Law 16-306, 53 D.C. Reg. 8610 (2007)... 20

Other Authorities

24 Am. Jur. 2d *Disorderly Houses* (2017).... 21

Eric Kurhi, *San Jose: SWAT Team Breaks up Rowdy Party at Vacant House*, The Mercury News (Aug. 11, 2016)..... 20

Wayne R. LaFave, *Search & Seizure* (5th ed. 2016)..... 41

Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2016)..... 28, 33, 38

Ken MacLeod, *Underage Drinking Party Busted At $1.2M Home Up For Sale*, CBS Boston (Nov. 16, 2016) 19

Model Penal Code § 2.02 34-35

Jonathan Mummolo & Bill Brubaker, *As Foreclosed Homes Empty, Crime Arrives*, Wash. Post, Apr. 27, 2008 19

Lupita Murillo, *Crime Trackers: Mansion Parties*, News 4 Tucson (Sept. 14, 2016)... 19-20

TABLE OF AUTHORITIES—Continued

Page(s)

Ira P. Robbins, *Double Inchoate Crimes*, 26 Harv. J. on Legis. 1 (1989) 33

Hudson Sangree, *Teens Throw Illegal Party at New Home in El Dorado Hills Subdivision*, The Sacramento Bee (Mar. 14, 2016) 20

William Spelman, *Abandoned Houses: Magnets for Crime?*, 21 J. Crim. Just. 481 (1993) 19

Nathan Tempey, *Airbnb Scammer Wrecks Williamsburg Family's Home in Epic Rager*, Gothamist (Sept. 30, 2016) 19

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 765 F.3d 13. The order denying rehearing en banc with concurring and dissenting statements (Pet. App. 102a-139a) is reported at 816 F.3d 96. The memorandum opinion of the district court partially granting respondents' motion for summary judgment on liability (Pet. App. 45a-99a) is reported at 841 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. The court of appeals denied a timely petition for rehearing en banc on February 8, 2016. On April 13, 2016, the Chief Justice extended the time for filing a petition for certiorari to June 8, 2016. The petition was filed that day and granted on January 19, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents brought this action under 42 U.S.C. § 1983 and District of Columbia common law, claiming that their arrests for criminal trespass were without probable cause.

The Fourth Amendment provides, in relevant part:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . .

The District of Columbia's criminal trespass statute provided at the relevant time:

> Any person who, without lawful authority, shall enter or attempt to enter, any public or private dwelling, building or other property, . . . against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor . . . . The presence of a person in any private dwelling, building, or other property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign, shall be prima facie evidence that any person found in such property has entered against the will of the person in legal possession of the property.

D.C. Code § 22-3302 (2008).

STATEMENT OF THE CASE

A. Factual Background.

As late Saturday night became early Sunday morning on March 16, 2008, respondents and an unknown number of others were partying in a home that did not belong to any of them, without the absent owner's permission. (Pet. App. 47a-48a; J.A. 99, 112.) The essential facts of what the police learned in those early morning hours are undisputed.

Concerned neighbors alerted the District of Columbia Metropolitan Police Department about the party,

reporting that the house was supposed to be vacant, and had been vacant for several months. (J.A. 94, 112, 131.) They also reported "illegal activities" at the party. (J.A. 98-99, 112.)

Uniformed officers arrived at the home around 1:30 a.m. (J.A. 112, 189.) Through a first-floor window, they saw one of the partiers inside run upstairs at the sight of their approach. (J.A. 112.) When the officers knocked and entered through the front door, others also scattered into different rooms. (J.A. 143.) After searching the home, petitioners Andre Parker and Anthony Campanale and other officers found 21 persons inside, including a man hiding in a closet. (Pet. App. 47a-48a; J.A. 177.) Another stayed in a bathroom after officers "bang[ed]" on the door, until they pushed it open. (J.A. 50.)

Gathering the partiers, the officers observed evidence of activity like that "conducted in strip clubs for profit." (J.A. 112.) Several women had been conducting "lap dances" and were "dressed only in their bra and thong with money hanging out [of] their garter belts." (J.A. 112, 154; C.A. App. 75-83 (photographs).) Someone told Officer Campanale that a woman had been "selling sex" upstairs, where police found some men and a naked woman. (J.A. 50, 73-74, 115-18, 122-23.) Police also found open and used condoms on the scene. (J.A. 112; C.A. App. 87.) In addition, officers smelled marijuana in the home. (J.A. 97-98, 131, 165.)

Consistent with its "being a vacant property," the house was in "disarray" and essentially unfurnished. (J.A. 97, 112.) It had just a mattress on the floor upstairs and some folding chairs. (Pet. App. 4a; J.A. 96-97.) Although the electricity (and perhaps the plumbing) had not been disconnected, the house was

dark during the party, with candles lit beside the mattress. (Pet. App. 4a; J.A. 52, 71-72, 96, 114.)[1]

A supervisor, Sergeant Andre Suber, and several other officers on the scene gathered information and interviewed all persons present. (J.A. 52-53.) When officers asked for information about the homeowner, the partiers had no answer. (J.A. 52-53, 67, 90.)[2] Several eventually said that they had been invited by other people, and some said that a woman whose real name they did not know—identified as "Peaches" (or sometimes "Tasty")—had been there previously and had given them permission to be in the home. (Pet. App. 48a n.4; J.A. 53, 97-98, 131-32, 135.) "Peaches" was not present when police arrived. (J.A. 53, 97-98.)

Officers took the time to further investigate. They called "Peaches" on the phone several times but she was "evasive" and repeatedly hung up. (J.A. 53-54.) She refused to come to the scene, explaining that she would be arrested if she did so. (J.A. 165.) "Peaches" asserted that she had told the partiers they could use the home. (J.A. 53.) She also initially claimed to police that the owner had given her permission to use the home and that she was "possibly" renting it from him. (J.A. 53-54.) Soon, though, "Peaches" admitted to police that, contrary to her initial claim, she lacked the owner's permission to use the home. (J.A. 54.)

Police also spoke with the homeowner, a Mr. Hughes, who confirmed that no one, including "Peaches,"

---

[1] The court of appeals perceived "inconsistencies" in the record regarding the exact state of the furnishings and other minor factual issues that are not material. (Pet. App. 4a & n.1.)

[2] The opinions below indicated that some partiers told police that they were there for a bachelor party, while others said it was a birthday party, and that, either way, no one identified the guest of honor. (Pet. App. 4a, 10a, 119a; *see* J.A. 35, 193 ¶ 28.)

had permission to be there. (J.A. 99-100.) Mr. Hughes stated that he and "Peaches" had tried, but failed, to reach a lease agreement. (J.A. 99.)

Based on all of this information, Sergeant Suber directed that the partiers be arrested for trespassing. (J.A. 55.) He had previously kept his watch commander, who was not on scene, informed of the situation, and she approved of his decision to arrest. (J.A. 57-58.) At summary judgment, Officer Parker did not recall placing anyone under arrest, while Officer Campanale did not recall the identity of anyone he arrested. (J.A. 75-77, 101, 139.)

After the arrestees were transported to the police station, the watch commander on the next shift decided that they should be charged instead with disorderly conduct, even though Sergeant Suber physically "provided him with the D.C. code of the unlawful entry statute." (J.A. 55-56, 63.) Prosecutors later decided not to pursue charges. (Pet. App. 120a.)

B. District Court Proceedings.

Respondents—16 of the 21 individuals arrested—brought suit in the United States District Court for the District of Columbia. (Pet. App. 46a.) They asserted Fourth Amendment claims under 42 U.S.C. § 1983 and tort claims under District of Columbia common law, all based on the alleged lack of probable cause for their arrests. (Pet. App. 46a, 63a.) They sued, among other defendants, the two petitioner officers, Parker and Campanale, and the petitioner District of Columbia, but not Sergeant Suber. (Pet. App. 46a.)

After discovery closed, both petitioners and respondents moved for summary judgment. (Pet. App. 47a.) Respondents did not submit any statement from "Peaches," or even any information about her identity.

The district court granted respondents summary judgment on liability on their false arrest claims against Parker and Campanale and related common-law claims against the District. (Pet. App. 100a-101a.) It held as a matter of law that the officers lacked probable cause to arrest for trespassing because "nothing about what the police learned at the scene suggests that [respondents] 'knew or should have known that they were entering against the owner's will.'" (Pet. App. 64a (alterations omitted).) Based on this view, the court denied the officers qualified immunity. (Pet. App. 74a.) The court further held that, whether or not they actually made any arrests, Parker and Campanale were liable as a matter of law for all of the arrests simply by being "actively involved in the matter at some juncture." (Pet. App. 83a.)

After a damages-only trial, the court entered a $680,000 judgment against Officers Parker and Campanale, and jointly against the District of Columbia for the common-law torts. (11/9/12 Judgment; *see* Pet. App. 121a & n.4.) It separately ordered Parker and Campanale (but not the District) to pay respondents' attorneys' fees under 42 U.S.C. § 1988. (2/5/13 Order on Mot. for Fees.) This has now brought the total award against the two officers to over $1 million. (*See* 2/5/13 Order on Mot. for Fees; 5/23/16 Order on Supp. Mots. for Fees.)

C. The Court of Appeals' Opinion.

A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's judgment. The court of appeals majority found no probable cause for the arrests, applying the same analysis for the Fourth Amendment and common-law false arrest claims. (Pet. App. 7a-17a.) It asked whether the officers had "at least *some*

evidence" that respondents knew or should have known that their entry was unauthorized—a mental state that, the court held, went to an element of the trespassing crime rather than just a potential defense. (Pet. App. 9a-11a.)

The court of appeals reasoned that "in the absence of any conflicting information, Peaches' invitation vitiates th[is] necessary element" of trespass. (Pet. App. 11a.) It explained: "A reasonably prudent officer aware that [respondents] gathered pursuant to an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully." (Pet. App. 11a.) According to the court, the homeowner's statement that respondents had entered unlawfully was not "sufficient" for probable cause since the homeowner "never said *that he or anyone else had told* [*respondents*] that they were" unwelcome. (Pet. App. 12a.)

The court of appeals rejected as "beside the point" the argument that the officers need not "sift through conflicting evidence or resolve issues of credibility." (Pet. App. 12a n.4.) It did so because it thought that the officers did not "observe anything" supporting the mental state required for trespassing. (Pet. App. 12a n.4.) The court further explained that there was "no evidence that the officers asked either Peaches or [the homeowner] whether [*respondents*] knew that Peaches had no right to be in the house." (Pet. App. 12a n.4.) The court continued: "Had [the officers] asked such questions and gotten an affirmative answer, [then petitioners'] argument would carry weight." (Pet. App. 12a n.4.) The court thus thought "there was no probable cause for the officers to believe that [respondents] entered the house" with a culpable mental state. (Pet. App. 12a-13a.)

The court of appeals also dismissed some of the facts on which the officers relied for probable cause, thus necessarily finding that these facts did not constitute "conflicting information" that would permit the officers to doubt the evidence of "Peaches' invitation." (*See* Pet. App. 11a, 126a.) It explained that "[t]o the extent that people scattered or hid when the police entered the house, such behavior may be 'suggestive' of wrongdoing, but is not sufficient standing alone to create probable cause." (Pet. App. 16a.) The court also rejected the view that the vacant "condition of the house, on its own, should have alerted the [partiers] that they were unwelcome." (Pet. App. 16a.) Such condition, the court concluded, was "entirely consistent with" a belief that "Peaches" might be a new tenant. (Pet. App. 16a-17a.)

The court of appeals also upheld the denial of qualified immunity. (Pet. App. 21a-24a.) It recognized that no case had "invalidated an arrest for [trespassing] under similar circumstances." (Pet. App. 22a.) In the court's view, however, it was enough that the law was clearly established in the following respects: that "probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense . . . , including any state-of-mind element"; and that the state-of-mind element for trespassing is that a suspect knew or should have known that his entry was unwelcome. (Pet. App. 23a.) The court of appeals also ruled that Officers Parker and Campanale could not reasonably rely on their supervisor's arrest order, and that they were liable for all of the arrests because they were the "hub" of the preceding investigation. (Pet. App. 28a-29a.) The court rejected the officers' defense of privilege on the common-law false arrest claim "for

essentially the same reasons" as it rejected qualified immunity. (Pet. App. 30a.)

Judge Brown dissented, objecting to the "impossible standard for finding probable cause the court [adopted]." (Pet. App. 33a.) She explained that the "decision undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden." (Pet. App. 34a.) This heightened burden, under which "all but the most implausible claims of invitation must be credited," "radically narrows the capacity of officers to use their experience and prudent judgment to assess the credibility of the self-interested statements of [suspects]." (Pet. App. 38a.) Judge Brown found the court's holding contrary to the "very purpose of a totality of the circumstances inquiry," which is "to allow law enforcement officers to approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism, and decline to give credence to evidence the officers deem unreliable under the circumstances." (Pet. App. 38a.)

Judge Brown concluded that the "circumstances surrounding the arrest[s] were sufficient to support the inference that the suspects knew or reasonably should have known their entry was unlawful." (Pet. App. 37a.) In particular, she found it relevant that the lawful owner had not permitted anyone to enter; the house was vacant and appeared so; the partiers ran and hid from police, gave police conflicting accounts about why they were there, and purported to rely on the invitation of someone who was not present; and when reached by phone, the purported inviter was uncooperative and untruthful with police. (Pet. App. 36a-39a.)

Judge Brown additionally opined that qualified immunity applied even if probable cause were lacking. (Pet. App. 41a-44a.) As she explained, the law had not previously required "officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims." (Pet. App. 43a-44a.)

D. The Court of Appeals' Denial of Rehearing En Banc.

Over a written dissent joined by four judges, the court of appeals denied rehearing en banc. In a statement concurring in the denial, the panel majority proclaimed that "there is nothing novel about our view." (Pet. App. 106a.) It characterized its opinion as recognizing that "so long as there is evidence giving rise to probable cause—even if that evidence is only circumstantial and short of preponderant—officers may lawfully arrest, no matter what a suspect claims in his or her own defense." (Pet. App. 106a.) The panel majority also insisted that its opinion recognizes the "important protection" of qualified immunity but "simply finds that a reasonable officer could not conclude, based on the information before *these particular officers*, that there was probable cause." (Pet. App. 107a.)

Judge Kavanaugh, joined by Judges Henderson, Brown, and Griffith, dissented from the denial of rehearing en banc. He indicated that petitioners had probable cause to arrest (Pet. App. 122a, 138a) and that, in any event, Officers Parker and Campanale at least deserved qualified immunity (Pet. App. 122a-123a, 132a). Judge Kavanaugh believed that rehearing en banc was necessary because "the panel opinion will negatively affect the ability of . . . police officers to

make on-the-spot credibility judgments that are essential for officers to perform their dangerous jobs and protect the public." (Pet. App. 118a.)

Judge Kavanaugh disagreed with the panel opinion's probable cause standard. (Pet. App. 125a-126a.) He queried: "In a case like this where the actus reas is complete and the sole issue is the defendant's mens rea . . . [,] are police officers always required to believe the statements of the suspects . . . ?" (Pet. App. 125a-126a.) Judge Kavanaugh recognized that the panel opinion "seems to say yes, at least for this kind of case." (Pet. App. 126a.) He explained that the panel opinion required officers to credit the suspects' statements "in the absence of any conflicting information" and that, under the panel's approach, reasonable doubts about the suspects' credibility "do not count as 'conflicting information.'" (Pet. App. 126a.)

Judge Kavanaugh wrote: "The panel opinion's approach is not and has never been the law." (Pet. App. 126a.) He noted that police officers "often hear a variety of mens rea-related excuses" from persons apparently engaged in criminal activity. (Pet. App. 126a.) When this happens, "police officers are entitled to make reasonable credibility judgments and to disbelieve protests of innocence from, for example, those holding a smoking gun, or driving a car with a stash of drugs under the seat, or partying late at night with strippers and drugs in a vacant house without the owner or renter present." (Pet. App. 126a.) He noted that "[a]lmost every court of appeals has recognized that officers cannot be expectedly to *definitively* resolve difficult mens rea questions in the few moments" available to them. (Pet. App. 127a-130a (citing cases).)

Judge Kavanaugh further recognized that "the panel opinion did what the Supreme Court has repeatedly told us not to do: [it] created a new rule and then applied that new rule retroactively against the police officers." (Pet. App. 136a.) As he noted, "the most relevant D.C. trespassing cases *supported* arrest in this kind of case." (Pet. App. 134a-135a (citing *Artisst v. United States*, 554 A.2d 327, 330 n.1 (D.C. 1989), and *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967).) Moreover, it was "crystal clear" that "[n]o decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances." (Pet. App. 136a.) Judge Kavanaugh wrote: "Whatever the merits of the panel opinion's new rule—and I think it is divorced from the real world that police officers face on a regular basis—it is still a new rule." (Pet. App. 137a.) As a result, he concluded that "[t]his should have been a fairly easy case for qualified immunity." (Pet. App. 136a.)

SUMMARY OF ARGUMENT

When police officers encounter apparent criminal activity, the Constitution requires them to act reasonably, not infallibly, on the facts known to them. These facts necessarily are considered from their perspective; officers are not, and cannot be, required to see through suspects' eyes or know their thoughts.

Considered from the proper perspective, the facts here established probable cause to arrest respondents for trespassing into a private home. They contest whether there was a reasonable ground to believe their guilt only by claiming there was no evidence that they knew, or even should have known, they lacked permission to be there. But the officers had found an unauthorized, late-night party in an unfurnished home that was supposed to be vacant and looked

unattended. The party involved illicit activities that are often associated with trespassing, and that the absent owner would have been quite unlikely to authorize. The partiers fled and hid at the officers' approach. And they were evasive and inconsistent in later trying to explain their presence. An experienced officer using common sense could reasonably think they knew or should have known that they were trespassing.

Against all this, the partiers rely on how some of them claimed an invitation by someone identified only as "Peaches" who was not on the scene. A reasonable officer could think this claim made their guilt more likely, not less. When police reached "Peaches" by phone, she too was evasive. She also refused to return to the scene, and she lied that she had the owner's authority to be in the home before finally admitting to the contrary. Given how this admitted trespasser and the partiers had engaged in a common enterprise, there was a fair inference that they had shared pertinent knowledge to further their common interest. At bare minimum, the officers did not have to accept this supposed corroboration of the partiers' claim of an invitation. "Peaches" lacked credibility and could not easily be held accountable for anything she said; police did not even have her real name.

Yet, according to the court of appeals, this claimed invitation precluded officers from reasonably believing even that the partiers should have known that they lacked the owner's permission. The court required the police to credit the dubious claim of invitation absent direct, affirmative proof of a culpable mental state. The probable cause standard does not function in this manner, and cannot if officers are to do their job protecting the public from crime, on the scene and with very limited time or ability to figure out the true

mental state of a suspect offering up an innocent explanation. The Fourth Amendment's reasonableness standard is a practical one, and practical considerations require that on-scene officers have wide latitude to make credibility determinations without fear that a judge later will disagree and hold them liable.

The court of appeals further disregarded practical concerns by requiring officers to act like lawyers. Under its heightened probable cause standard, the court required them to consider probable cause separately on each element of the offense, and then to consider whether they had direct rather than circumstantial proof of mental state. But the fluid and flexible probable cause standard requires just a fair probability of guilt on the offense as a whole. It does not require officers to undertake an intricate and lawyerly analysis before presenting an arrestee for potential prosecution. Nor does it require them to predict how courts will resolve difficult legal issues, and here a reasonable officer could have understood prevailing case law to make the partiers' claim of a reasonable, good-faith belief in their right of entry relevant only to an affirmative defense for trial, not an element of the crime of trespass.

The court of appeals still more clearly erred in denying the on-scene officers qualified immunity. It relied on generalized propositions that did not provide the officers fair notice that the arrests were unlawful in the particular situation here. Relevant court decisions supported arrests and even convictions under similar facts, while none found probable cause to be lacking under remotely comparable circumstances. The unconstitutionality of the arrests was not clearly established, as there was at least *arguable*

probable cause. Indeed, four dissenting judges below thought that the officers *did* have probable cause, and this Court should agree. Based on either probable cause or qualified immunity, the judgment below cannot stand.

ARGUMENT

I. Considered From The Perspective Of A Reasonable Officer On The Scene, The Totality Of The Circumstances Provided Probable Cause To Arrest Respondents For Trespassing.

"The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The Court thus analyzes the constitutionality of a seizure "from the perspective of a reasonable officer on the scene," *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (internal quotation marks omitted); *see Illinois v. Gates*, 462 U.S. 213, 231-32 (1983), in light of what is "practical and common-sensical," *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). This analysis recognizes the difficulties facing officers who, confronted with an apparent crime in their presence, must decide in a short time, and with necessarily limited information, whether to arrest.

Probable cause "is not a high bar." *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014). It requires only the "kind of 'fair probability' on which 'reasonable and prudent people, not legal technicians, act.'" *Id.* (brackets omitted) (quoting *Gates*, 462 U.S. at 238). The Court consistently rejects attempts to require on-scene officers assessing probable cause to apply "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach" looking to the "totality of the circumstances." *Harris*, 133 S. Ct. at 1055. "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of

the evidence . . . have no place in the probable-cause decision." *Id.* (brackets omitted) (quoting *Gates*, 462 U.S. at 235). Thus, probable cause to arrest is simply a "reasonable ground for belief of [the arrestee's] guilt" when the historical facts leading up to the arrest are considered from "the standpoint of an objectively reasonable police officer." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

What the officers undisputedly knew here was enough to establish probable cause to arrest for criminal trespass—or, at bare minimum, to foreclose the contrary view at summary judgment. The officers did not have to credit the partiers' claim that they reasonably believed they had a right to be in the home, when officers had confirmed that they had no such right and had strong circumstantial evidence that the partiers knew or at least should have known as much. The officers could instead arrest and let prosecutors decide whether to try to prove these apparent trespassers' guilt beyond a reasonable doubt. And since all of the partiers' claims, under the Fourth Amendment and the common law, depended on the lack of constitutional probable cause to arrest (Pet. App. 7a, 30a, 63a), they all fail.

A. The officers had a reasonable basis on these facts to think that the partiers had committed trespass, and in particular that they knew or should have known they had no right to be in the home.

1. The officers knew that the partiers lacked the right to be in the home, had obvious reasons to think their entry was unauthorized, and acted suspiciously.

a. There is no dispute that the statutory elements of criminal trespass were met in this case: "(1) entry

[of a private dwelling] that is (2) unauthorized—because it is without lawful authority and against the will of the owner or lawful occupant." *Cartledge v. United States*, 100 A.3d 147, 149 (D.C. 2014); *accord* D.C. Code § 22-3302 (2008). Each of the partiers had entered the home. (Pet. App. 47a.) The property owner informed police that the partiers' entry was against his will. (J.A. 99-100.) While "Peaches" initially told police that the owner had permitted her to use the home, she soon confessed to police that he had not given such permission. (J.A. 53-54.) And there is also no claim that the entry, despite being against the owner's will, was nevertheless with "lawful authority"; the partiers were not, for example, police officers executing a search warrant. *See Cartledge*, 100 A.3d at 149.

Instead, respondents try to attack probable cause by claiming that they had a reasonable, good-faith belief in their right to enter based on the purported invitation of "Peaches." This belief, they contend, negated the mental state that they say was required for the offense, even though not found in the statutory text: that they knew or should have known that they lacked the owner's permission. But even assuming for the moment that the arresting officers had to understand this mental state as an offense element, rather than an affirmative defense, the claim of invitation did not overcome the totality of the circumstances establishing probable cause.

To begin, the police officers were faced with an undisputed entry into a private home contrary to the owner's will. A reasonable officer was entitled to use common sense to infer that the apparent trespassers knew, or at least should have known, that they were trespassing. A prudent officer would know that people

acting reasonably and in good faith, as the partiers claimed they were, do not ordinarily end up in other people's homes without permission. In this situation as in many others, a culpable mental state "may be inferred from the act." *Henderson v. Morgan*, 426 U.S. 637, 646 n.17 (1976); *see United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) ("[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts."). If a jury in a criminal trial may draw such an inference beyond a reasonable doubt, an objectively reasonable police officer, assessing probable cause, may draw this inference too. *See, e.g.*, *United States v. Mousli*, 511 F.3d 7, 16 (1st Cir. 2007) (finding sufficient evidence to support counterfeiting conviction because the defendant's printing of several fake bills, though of poor quality, permitted an inference of intent to defraud); *Jordan v. Mosley*, 487 F.3d 1350, 1355 (11th Cir. 2007) (reasoning that the fact that a person damaged property "provides some evidence to believe that [he] intended to damage" the property).

b. This inference was especially reasonable in the circumstances here. Other clear signs—obvious to the police and the partiers—indicated that the partiers' entry was contrary to the owner's will. This was a large party in a vacant home, late at night, with no actual or purported owner or tenant present—not Hughes, and not even "Peaches." (Pet. App. 47a-48a; J.A. 97-99.) Neighbors told the police that the home was supposed to be vacant and had been vacant for months. (J.A. 112, 131.) The home was essentially unfurnished—with only a mattress on the floor and some folding chairs—and in "a state of disarray." (Pet. App. 4a; J.A. 96-97, 112.)

These circumstances strongly suggested that the partiers' presence had not been authorized by anyone with lawful authority. An objectively reasonable officer could think that the partiers knowingly were taking advantage of an absent property owner who could not regularly monitor the home and thus take action against their late-night entry. At minimum, it was reasonable to believe that those attending the party should have known that their entry was unwanted in these circumstances, and that any failure to know was culpable, whether due to carelessness or willful blindness. *See, e.g.*, *United States v. Garrett*, 984 F.2d 1402, 1413 (5th Cir. 1993) (upholding conviction based on sufficient evidence that defendant, when entering a secured area, "should have known" that she had a gun in a bag despite her denial of knowledge).

Trespassing in vacant homes, sometimes by large groups, is a frequent and well-known problem, and was around that time. *See, e.g.*, Jonathan Mummolo & Bill Brubaker, *As Foreclosed Homes Empty, Crime Arrives*, Wash. Post, Apr. 27, 2008, at A1. Trespassers target vacant homes to use not only for unauthorized parties, but also for other illegal activities, including drug use and prostitution. William Spelman, *Abandoned Houses: Magnets for Crime?*, 21 J. Crim. Just. 481, 488-89 (1993).[3] Indeed, just the year before the arrests

---

[3] Officers nationwide respond to complaints about parties held without the owner's permission in vacant homes, in diverse factual scenarios. *See, e.g.*, Ken MacLeod, *Underage Drinking Party Busted At $1.2M Home Up For Sale*, CBS Boston (Nov. 16, 2016), http://boston.cbslocal.com/2016/11/16/underage-drinking-party-busted-nh-home-for-sale; Nathan Tempey, *Airbnb Scammer Wrecks Williamsburg Family's Home in Epic Rager*, Gothamist (Sept. 30, 2016), http://gothamist.com/2016/09/30/airbnb_gone_wrong_williamsburg.php; Lupita Murillo, *Crime Trackers: Mansion Parties*, News 4 Tucson (Sept. 14, 2016), http://www.kvoa.com/

at issue, the District of Columbia's legislature had acted to combat the prevalence of trespassing in vacant buildings, amending the trespass statute to facilitate prosecution in these circumstances. *See* D.C. Code § 22-3302 (2008) ("The presence of a person in any private dwelling . . . that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered . . . shall be prima facie evidence that any person found in such property has entered against the will of the [owner].") (as amended by D.C. Law 16-306, § 219, 53 D.C. Reg. 8610, 8637 (2007)). District of Columbia courts have also long recognized that a person's presence in a vacant home, not his or her own, suggests that the entry was unlawful. *See Culp v. United States*, 486 A.2d 1174, 1177 (D.C. 1985).

The partiers' illicit actions in the home further gave officers grounds to believe that they knew or should have known their entry was unapproved. Officers smelled marijuana in the house. (J.A. 97-98, 131.) They further observed activities consistent with a for-profit strip club. (J.A. 112.) Scantily dressed women in garter belts stuffed with money were downstairs, one naked woman and several men were upstairs, and there was evidence of sexual acts in exchange for money. (J.A. 50, 73-74, 112, 115-18, 122-23, 154; C.A. App. 87.) It would have been obvious to anyone that

---

story/32935553/crime-trackers-mansion-parties; Eric Kurhi, *San Jose: SWAT Team Breaks up Rowdy Party at Vacant House*, The Mercury News (Aug. 11, 2016), http://www.mercurynews.com/2016/07/24/san-jose-swat-team-breaks-up-rowdy-party-at-vacant-house/; Hudson Sangree, *Teens Throw Illegal Party at New Home in El Dorado Hills Subdivision*, The Sacramento Bee (Mar. 14, 2016), http://www.sacbee.com/news/local/crime/article66004777.html.

a typical homeowner or resident, absent from the premises, would not normally surrender the home to a group of people to party with illegal drugs and strippers in this manner. This is particularly true since public nuisance laws, like those in the District, subject a property owner to enforcement action and various penalties when a property is used for drugs or prostitution. *See* D.C. Code §§ 22-2713 to -2720 (2008); 24 Am. Jur. 2d *Disorderly Houses* §§ 1-46 (2017). At the very least, ingrained social norms about the sanctity of the home gave notice to the partiers that their conduct was likely unwelcome to the owner.

c. Even setting all that aside, the partiers' conduct in response to the police was highly suspicious and evinced consciousness of guilt. When uniformed officers knocked and entered, the partiers scattered and hid. (J.A. 112, 143.) One was found hiding in an upstairs closet. (J.A. 177.) This provided strong indication that the partiers in fact knew or suspected that their presence was unlawful. As this Court has explained, "deliberately furtive actions and flight at the approach of strangers or law enforcement officers are strong indicia of *mens rea*." *Peters v. New York*, 392 U.S. 40, 66 (1968); *see Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (explaining similarly that flight, though "not necessarily indicative of wrongdoing, . . . is certainly suggestive of such"). Thus, when such actions are "coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Peters*, 392 U.S. at 66-67.

The partiers also could not adequately explain their presence. When police asked who owned the home, the partiers had no answer. (J.A. 52-53, 67.) Eventually, one of the partiers stated that "Peaches" had invited

them, but others told the police that they were there at the invitation of someone else. (J.A. 135.) It is telling that the partiers responded this way while the officers were trying to figure out why the partiers were in someone else's house. The inconsistent and incomplete explanations only further supported probable cause. *See, e.g., United States v. Ameling*, 328 F.3d 443, 448-49 (8th Cir. 2003) (holding that prior grounds for suspicion, combined with the suspects' "inconsistent accounts of their time in town," established probable cause that they had been there for criminal activity).

2. *A reasonable officer could think the partiers' common enterprise with "Peaches" made their own guilt more likely, not less, and at least could discredit their claim of reliance on an invitation by this admitted trespasser.*

The lynchpin of the partiers' contrary case is their purported invitation into the home by "Peaches," which they say defeated any reasonable belief that they knew or should have known that they had no right of entry. To the contrary, given what was known of "Peaches," a reasonable officer was entitled to believe their common enterprise with her heightened the possibility that they had committed a crime. At minimum, officers did not have to credit that the partiers actually and reasonably relied on this supposed invitation despite all the other indicia of a guilty state of mind.

"Peaches" was an admitted trespasser. She knew that she and the partiers lacked permission to be in the home, yet she entered it and purportedly invited at least some of the partiers to do the same. (J.A. 53-54.) She also attempted to avoid and mislead the police. (J.A. 53-54.) When they contacted her by

phone, she was evasive, she repeatedly hung up on the officers, and she refused to return to the scene because she said she would be arrested. (J.A. 165.) She also initially claimed that she had authority to be in the home before later admitting to police, prior to the arrests, that she had no such authority. (J.A. 53-54.)

a. Since "Peaches" and the partiers were engaged in a common enterprise, an officer might fairly impute her knowledge about the lack of authority to the partiers. "Peaches" and the partiers may have shared the pertinent details of their planned gathering, including the fact that they did not have permission to have their party at their chosen location. This fact would have been highly relevant to the choice of location as well as the overall conduct and success of their enterprise. It was foreseeable that someone might come by the house to question the partiers' authority to be there. "Peaches" had some incentive to make the partiers aware of the lack of authority, so that they could avoid attracting undue suspicion and, if necessary, dodge or deflect any such inquiry. She also had disincentive to invite innocent persons, who might be quick to implicate her if their presence were questioned.

The Court's decision in *Pringle* is analogous in pertinent respects. There, police stopped a speeding car with three occupants: the driver and owner of the car, a front-seat passenger, and a backseat passenger. 540 U.S. at 368. A search revealed $763 in cash in the glove compartment and five baggies of cocaine behind the backseat armrest. *Id.* After no one admitted ownership of the drugs, police arrested all three for possession. *Id.* at 368-69. This Court unanimously found probable cause to arrest the front-seat passenger, even though he was not the car's owner or driver, or even in the backseat where the drugs were hidden.

Id. at 372. It held that it was "an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion or control over, the cocaine." *Id.* This was not "guilt by association"—rather, the Court explained, it was reasonable to infer a common enterprise among the three occupants. *Id.* at 373.

Like the officers in *Pringle*, the officers here knew that a crime had been committed, and the only question was whether there was probable cause to arrest all of the occupants. While in *Pringle* there was a need to infer a common enterprise among them, here a common enterprise was undisputed: the partiers admittedly arranged with "Peaches" to enter and use a private home for the party. (J.A. 53.) As in *Pringle*, the existence of the common enterprise permitted the reasonable inference of shared knowledge among those involved. In *Pringle*, the shared knowledge (and control) was that of drugs; here, it was the shared knowledge that the entry and the party were unauthorized. 540 U.S. at 373; *see also Dumbra v. United States*, 268 U.S. 435, 440-41 (1925) (finding probable cause that a winery owner possessed wine for an unlawful purpose, despite a permit, based on actions of family members apparently associated with his business).

b. At the very least, a reasonable officer had grounds to discredit whether the partiers in fact had relied on an invitation—and *reasonably* so—even if "Peaches" said she had invited them. She could not provide credible corroboration of the partiers' claim of a legitimate invitation.

"Peaches" had proven herself to lack credibility. As the police knew, she tried to evade their inquiries by phone, and she refused to return to the home so that

they could speak to her in person. (J.A. 53-54, 165.) The police also knew that "Peaches" had lied to them about a central issue in their on-scene investigation: whether anyone had permission to be in the home. She falsely told the police that she had the owner's authority before admitting to them otherwise. (J.A. 53-54.) This evasive behavior and false statement deprived her other statements to police of credibility.

A further reason why the officers did not have to accept her purported corroboration is that they knew she may have felt able to say anything she wanted with impunity. Not only did "Peaches" refuse to make herself available to the officers by returning to the home, she was not even identified by actual name. (J.A. 53, 97, 131, 135.) All police had, at least at that point, was a pseudonym on a cell phone. She thus had—or at least could have felt—considerable impunity to make false statements without fear of repercussion. She could attempt a cover-up to protect her fellow partiers (perhaps hoping they might also further protect her), with the sound expectation that she would not face legal consequences for doing so.

The officers were not required to accept the partiers' claim of reasonable reliance on an invitation when the corroboration that was offered proved untrustworthy. *See Wright v. West*, 505 U.S. 277, 296 (1992) (plurality op.) (recognizing that a jury was entitled to disbelieve the accused's uncorroborated testimony innocently explaining possession of stolen property); *Peters*, 392 U.S. at 49, 66-67 (finding probable cause to arrest for attempted burglary despite the suspect's explanation that he was in the apartment building to visit a girlfriend whom he did not name because she was married).

Indeed, it was a fair inference that the partiers and "Peaches," furthering their common enterprise, concocted the alleged invitation either beforehand, anticipating that the partiers' presence might be questioned, or afterwards (by phone or text), once police arrived at the home. It was also reasonable to infer from these facts that, even if "Peaches" had conveyed an "invitation," she did so in a manner that alerted or suggested that she was without actual authority to do so. Alternatively, even if "Peaches" had not so much as hinted to the partiers about her lack of authority, a reasonable officer could infer, from all of the suspicious circumstances that night, that the partiers still knew that they were not permitted to be there. Or a reasonable officer could infer that they at least should have known, even if they honestly believed they had received a legitimate invitation. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("Th[e totality-of-the-circumstances test] allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them . . . ."). For all these reasons, officers were not required to accept the partiers' word as the end of the matter.

B. The court of appeals' errors of law made its version of probable cause too demanding, inflexible, and impractical.

The historical facts leading to the arrest thus justified an objectively reasonable belief that the partiers had committed trespass. In holding otherwise, the court of appeals failed to adhere to two fundamental legal tenets. First, on-scene officers should not be required to correctly and definitively resolve a suspect's claim of an innocent mental state. Second, on-scene officers should not be required to act like

lawyers parsing doctrine as to each element of a crime—especially where the putative "element" reasonably might have been thought an affirmative defense instead.

Although probable cause requires only "fair probability" as assessed by "reasonable and prudent" people, not "legal technicians," *Kaley*, 134 S. Ct. at 1103, the court of appeals set the bar much higher as a result of these legal errors. Indeed, as aptly described by Judge Brown's dissent, it set an "impossible standard" for probable cause. (Pet. App. 33a.)

1. On-scene officers should not be held liable for failing to correctly and definitively resolve a suspect's claim of an innocent mental state.

The court of appeals held that the purported invitation of "Peaches" vitiated any belief that the partiers knew or should have known that their presence was unauthorized, at least "in the absence of any conflicting information." (Pet. App. 11a.) In the court's view, the reasonable circumstantial grounds that officers had to doubt the partiers' story did not count as the "conflicting information" it required for probable cause. (Pet. App. 11a-12a & n.4.) The court instead demanded direct, affirmative proof of their state of mind, such as a statement from "Peaches" or the homeowner that the partiers knew that their entry was unlawful. (Pet. App. 11a-12a & n.4.) This heightened probable cause standard is impractical, and it improperly disregards how probable cause is considered from the perspective of a reasonable officer, who understandably is limited to what is knowable.

a. In most arrest situations, on-scene officers will have only limited, circumstantial evidence of *mens rea*. "Absent a confession, the officer . . . will always be

required to rely on circumstantial evidence regarding the state of [the suspect's] mind." *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000). Frequently, officers will have no witness who is able, or willing, to offer information on the suspect's mental state. A person engaged in unlawful conduct "does not often contemporaneously speak or write out his [or her] thoughts for others to hear or read." 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(f) (2d ed. 2016). Due to such inherent limitations, "it is impossible for a police officer to ascertain with any degree of certainty that a [suspect] possessed a particular state of mind at the time of the commission of some act." *Krause v. Bennett*, 887 F.2d 362, 371 (2d Cir. 1989). Because "the practical restraints on police in the field" in ascertaining intent are enormous, "the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great." *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004).

It cannot be that, because state-of-mind evidence is limited, officers must accept a suspect's claim of an innocent mental state. "Rarely will a suspect fail to proffer an innocent explanation for his suspicious behavior." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009). For example, suspects commonly deny knowledge when contraband is found. *See, e.g.*, *Pringle*, 540 U.S. at 368 (cocaine and money in car); *United States v. Schene*, 543 F.3d 627, 632 (10th Cir. 2008) (child pornography on home computer); *United States v. Jernigan*, 341 F.3d 1273, 1276 (11th Cir. 2003) (gun in truck); *United States v. Delreal-Ordones*, 213 F.3d 1263, 1265 (10th Cir. 2000) (drugs in suitcase). Persons caught in criminal activity might also claim that they relied in good faith on others, *see United States v. Renner*, 648 F.3d 680, 684-85 (8th Cir. 2011) (tax evasion), or were just innocent

dupes in another's criminal scheme, *see United States v. Iwuala*, 789 F.3d 1, 4 (1st Cir. 2015) (health-care fraud); *United States v. Anderson*, 755 F.3d 782, 789 (5th Cir. 2014) (aiding bank robbery).

Trespassing is no different. Apparent trespassers can offer a variety of "good-faith" claims, beyond just a claim of invitation, to deny a culpable mental state. If they had not been previously warned off by the property owner—or even if they *had* been—they could contend that they had been unaware that their entry was unwelcome. The intruders might claim that they failed to see "no trespassing" signs, *see Considine v. Jagodinski*, 646 F. App'x 283, 285 (3d Cir. 2016), or failed to recognize that a prior owner's objection carried over to a new owner, *see Borgman v. Kedley*, 646 F.3d 518, 524 (8th Cir. 2011). Even if their entry was against the owner's express objection, they might claim good faith based on some asserted property interest of their own. *See Zimmerman v. Doran*, 807 F.3d 178, 182-84 (7th Cir. 2015) (timber deed); *Finigan v. Marshall*, 574 F.3d 57, 61-63 (2d Cir. 2009) (legal title shared with estranged spouse). Intruders might also question the private property owner's claim of right by asserting a belief that they were actually on public land. *See Bodzin v. City of Dall.*, 768 F.2d 722, 723-25 (5th Cir. 1985). Officers regularly have to assess, on the spot, the credibility of these claims.

Such claims cannot negate probable cause if there is an objectively reasonable basis to discredit them. The court of appeals' decision undercuts an officer's ability to use his or her experience, judgment, and direct observations to assess the credibility of a suspect's innocent state-of-mind explanation. *See Ornelas v. United States*, 517 U.S. 690, 700 (1996) (explaining that "a police officer may draw inferences based on

his own experience in deciding whether probable cause exists"). In the real world in which they function, police officers must "approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism." (Pet. App. 38a.) Otherwise, those caught in apparent criminal activity could generally avoid arrest simply by asserting an innocent mental state. Even if officers disbelieved such assertions, the approach of the court of appeals here would lead them to forgo arrests for fear that a judge, far removed from the scene and years later, might make a different credibility judgment and then hold them personally liable.

Probable cause does not require that officers correctly resolve questionable claims of an innocent mental state. Instead, if the prosecutor chooses to press charges, the credibility of such claims ultimately is for the fact-finder at a criminal trial. *Wright*, 505 U.S. at 277, 296. This Court has "left to the trier of fact" whether circumstantial evidence proves the defendant's knowledge, *McFadden v. United States*, 135 S. Ct. 2298, 2306 n.3 (2015), or whether the defendant's "profession of innocent intent" should be believed, *Morissette v. United States*, 342 U.S. 246, 276 (1952). Perhaps at a criminal trial, a judge or jury weighing the evidence might have concluded as did the court of appeals: the partiers' entry, though unauthorized, was not culpable. But it is the role of the judge or jury, not the police officer, to finally determine guilt, including whether the accused acted with the "requisite intent." *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979); *accord Marks v. Carmody*, 234 F.3d 1006, 1009 (7th Cir. 2000) (holding that arresting officers did not have to believe evidence of lack of intent since "issues of mental state and credibility are for judges and juries to decide").

The factfinder cannot even determine guilt if police are precluded from making the arrest in the first place.

b. The Court thus should reject the suggestion below that the claim of invitation could only be overcome with "conflicting information" in the form of direct—as opposed to circumstantial—evidence. (Pet. App. 11a-12a & n.4, 33a-34a.) As Judge Brown recognized, "[t]he absence of direct, affirmative proof of a culpable mental state is not the same thing as undisputed evidence of innocence." (Pet. App. 33a.) In *Pringle*, the decision under review had required "specific facts tending to show Pringle's knowledge and dominion or control over the drugs." 540 U.S. at 369. This Court disagreed. Even without such specific facts, this Court thought it "an entirely reasonable inference" that Pringle knew about the cocaine in the car. *Id.* at 372. The court of appeals here erred in much the same way.

Indeed, this Court has repeatedly cautioned against imposing doctrinal requirements for probable cause in this manner. "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest . . . is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Thus, in *Gates*, the Court abandoned a test for informant reliability "because it had devolved into a 'complex superstructure of evidentiary and analytical rules,' any one of which, if not complied with, would derail a finding of probable cause." *Harris*, 133 S. Ct. at 1056 (quoting *Gates*, 462 U.S. at 235). And recently the Court in *Harris* rejected, as a prerequisite for probable cause, a

"strict evidentiary checklist" assessing the reliability of a drug-detection dog. *Id.* Probable cause, after all, is "not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232.

c. While the court of appeals later denied that it was applying a heightened probable cause standard (Pet. App. 105a-106a), it provided no other basis for disregarding all the reasonable grounds to doubt the partiers' story. The court dismissed some of the suspicious facts by viewing them in improper isolation. It explained that the partiers' act of scattering and hiding upon the uniformed officers' arrival is "not sufficient *standing alone* to create probable cause." (Pet. App. 16a (emphasis added).) It likewise concluded that the vacant "condition of the house, *on its own*," would not have alerted the partiers that something was amiss. (Pet. App. 16a (emphasis added).) Viewing these facts in isolation from each other, and from the other objective bases to discredit the partiers' claim, violated the "totality of the circumstances" test. *Pringle*, 540 U.S. at 372 n.2; *Arvizu*, 534 U.S. at 274.

The court of appeals also improperly dismissed these suspicious facts as "consistent with" the partiers' innocent explanation. (Pet. App. 15a, 16a.) Perhaps, it suggested, the home was vacant because "Peaches" was a new tenant who had not yet bothered to move in. (Pet. App. 16a-17a.) This is not the test for probable cause either. "[I]innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Gates*, 462 U.S. at 245 n.13; *see Wardlow*, 528 U.S. at 124-25 ("[C]ourts do not have available empirical studies dealing with inferences drawn from suspicious behavior,

and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists."). "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." *Gates*, 462 U.S. at 245.

Even if accepting the innocent explanation would have been reasonable here, so too was drawing the contrary inference that the partiers knew or should have known they were unwelcome. That is enough for probable cause. *See id.* at 245-46; *see also Conner v. Heiman*, 672 F.3d 1126, 1132 (9th Cir. 2012) (recognizing that whether the inference of innocent intent "was also reasonable, or even more reasonable, does not matter so long as the [culpable intent] conclusion was itself reasonable").

d. The court of appeals' heightened probable cause standard has broad implications. While implicating any *mens rea* offense, it imposes a particularly significant obstacle to officers' ability to protect the public against property crimes.

Beyond violating privacy and property rights that alone warrant protection, trespasses are "sufficiently dangerous" to criminalize because, based on "common experience," they are "preparatory acts that frequently lead to burglaries." Ira P. Robbins, *Double Inchoate Crimes*, 26 Harv. J. on Legis. 1, 97 (1989). Since trespass is generally a lesser-included offense of burglary, 3 LaFave, *Substantive Criminal Law* § 21.2, officers will face the same limitation in enforcing laws against burglary as against trespassing.

Even where the trespass does not involve real property, but personal property, similar enforcement

problems would arise. Officers could not arrest a person for unauthorized use of a vehicle if he dubiously claimed to have borrowed it from someone with apparent authority absent direct evidence refuting the claim. Even if the vehicle's owner had reported it stolen, they could not arrest. Officers would likewise have to accept all but the most implausible claims that stolen property found in a suspect's possession was acquired in good faith.

At minimum, the court of appeals' standard provides a recipe for those committing property crimes to evade arrest: just arrange for one off-site conspirator, like "Peaches" here. If the police detected the individual's criminal activity and the owner complained about it, the conspirator could be available by phone to say that she had invited or otherwise authorized the individual's use of the property. She would not have to provide her actual name, come to the scene, or otherwise risk being identified and held accountable for any false statements. In the court of appeals' view, police officers in this situation would be limited to throwing up their hands and politely asking everyone to go on their way. (Pet. App. 17a.)

The court of appeals' heightened standard also sharply restricts the enforcement of criminal laws requiring higher levels of culpability. For the District's trespass statute, no more is required than that the person at least "should have known" that the entry was against the owner's will. *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013). This is an objective standard, which does not require subjective awareness of the risk that entry is unwelcome. *See id.* It is akin to negligence. But negligence is on the low range of culpable mental states, which ascend to recklessness, knowledge, and, ultimately, purpose. Model Penal

Code § 2.02. If the information available to the officers here did not even suffice, on probable cause, for negligence, then the evidence that would be required for these higher levels of culpability would be extraordinary. The court of appeals' approach is untenable.

2. On-scene officers assessing probable cause should not have to apply a technical analysis or predict how courts will resolve complex legal issues.

a. The court of appeals' analysis also requires too much of police officers in a separate way. In holding that officers had to accept the partiers' story, the court of appeals applied a rigid and technical view of probable cause rather than a flexible, common-sense approach. The court in the end required "probable cause" as to each specific element, including whether the partiers knew or should have known that their entry was unauthorized. (Pet. App. 12a-13a, 108a.) Moreover, as discussed, the court held that the circumstantial evidence was insufficient for this element, suggesting that direct, affirmative proof was required instead.

Police officers on the scene, however, need not conduct such a technical analysis. Probable cause does not require officers to sort through the elements of an offense in this manner, precisely identifying every element while carefully separating and weighing the available facts as to each. Probable cause is not "a prima facie showing" of criminal activity, *Gates*, 462 U.S. at 235, and "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149 (1972). Instead, probable cause is a "fluid concept." *Harris*, 133 S. Ct. at 1056. Officers investigating criminal activity must apply the concept quickly in an uncertain, evolving, and

often dangerous environment. Even if officers had time to conduct a legal analysis, they are not legal technicians.

b. Relatedly, on-scene officers should not be required to act like lawyers and predict how courts will resolve complicated legal questions. Here, as can often occur, the law was unclear as to the specific elements of the offense. Criminal trespass, as defined in the District's statute, occurs when a person, "without lawful authority . . . enter[s] . . . [a] private dwelling . . . against the will of the lawful occupant or the person lawfully in charge thereof." D.C. Code § 22-3302 (2008). These statutory elements were clearly satisfied here. The statute did not identify any other element, including a *mens rea* requirement. Reviewing the statutory text, on its face, would have only confirmed that the offense occurred and that the arrests were proper.

Probable cause may be present even when dependent on a reasonable view as to the offense elements that is later rejected in the courts. *Heien v. North Carolina*, 135 S. Ct. 530, 536-40 (2014). Studying the case law at the time of the arrests here would not have resolved questions about whether *mens rea* was relevant to an element of the District's criminal trespass statute or instead an affirmative defense. And the officers on the scene did not have to predict the results of the detailed legal analysis of the case law that the court of appeals went on to perform years later. (Pet. App. 10a-11a.)

District of Columbia courts have recognized that, "[i]f a trespass is committed under a bona fide belief of a right to enter, such may be shown in defense." *Whittlesey v. United States*, 221 A.2d 86, 92 (D.C.

1966). The good-faith belief must have "some reasonable basis." *Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971). Also, it "must be based in the pure indicia of innocence"; for example, that the defendant had "no reason to know that he was trespassing on the rights of others." *Gaetano v. United States*, 406 A.2d 1291, 1294 (D.C. 1979). This "reasonable, good-faith belief" defense further requires that the entry have been for "a good purpose." *McGloin*, 232 A.2d at 91.

The District of Columbia Court of Appeals has explained that the defendant is entitled to a jury instruction on this defense only if there is a sufficient basis for it. *See Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993); *Abney v. United States*, 616 A.2d 856, 862-63 (D.C. 1992); *Leiss v. United States*, 364 A.2d 803, 809 (D.C. 1976). One of these cases stated that a person who has such a belief "lacks the element of criminal intent required for the offense." *Smith*, 281 A.2d at 439. But another case put it differently: "The elements of the crime [of trespass] are clear" and "not at issue here . . . [but, w]hat is at issue is the defense of a 'bona fide belief.'" *Gaetano*, 406 A.2d at 1293; *see also United States v. Thomas*, 444 F.2d 919, 926 (D.C. Cir. 1971) (listing the elements of criminal trespass and explaining that, by contrast, whether "a person believed he had a right to be in such a building is a matter for the defense"). Other cases indicated just that a "general intent to enter" was an element. *See, e.g.*, *Culp*, 486 A.2d at 1176. Another added that the entry be against the owner's "expressed" will but clarified that this additional requirement does not apply to a private dwelling as here. *See McGloin*, 232 A.2d at 91.

Given the statutory text and the case law, a prudent officer could have understood that a claim of a

reasonable, good-faith belief raised an affirmative defense for trial and did not vitiate probable cause. That is, it was fair for an officer to believe that the accused's mental state, as to whether the entry was unwanted, was not an element of the offense. Because a jury must be instructed "to find each element of the crime," *Cabana v. Bullock*, 474 U.S. 376, 384 (1986), the court's ability to deny an instruction regarding a reasonable, good-faith belief further suggested that it concerned only an affirmative defense. Under this view, the only required mental-state component would have involved the element of "entry": the physical act of entering had to be intentional and voluntary, not accidental. This would have been consistent with any requirement of a "general intent to enter." *See Culp*, 486 A.2d at 1176; 1 LaFave, *Substantive Criminal Law* § 5.2(e) (explaining that, under a common usage, "general intent is only the 'intention to make the bodily movement which constitutes the act which the crime requires'").

As an affirmative defense, a claim of a reasonable, good-faith belief would have to be raised and resolved in the course of trial or other judicial proceedings. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("An affirmative defense applies only after prosecution has begun . . . ."). Even for a grand jury's probable-cause findings, "it has always been thought sufficient to hear only the prosecutor's side"; the suspect's defenses need not be presented. *United States v. Williams*, 504 U.S. 36, 51-52 (1992). While the prosecutor always has the burden of proving the offense elements at trial, the criminal defendant has at least the burden of production, and can have the burden of proof, on any affirmative defense. *Smith v. United States*, 133 S. Ct. 714, 718-19 (2013). Moreover, even when an affirmative defense, if proven, is a

complete defense to a charge, it does not necessarily establish the defendant's innocence; for example, it may merely excuse the crime or prevent prosecution. *Id.* at 719-20. A police officer therefore typically need not resolve an affirmative defense before making an arrest, at least if there were any doubt whether the defense would prevail. *See Holman v. City of York*, 564 F.3d 225, 231 (3d Cir. 2009) (explaining that the affirmative "defense of necessity need not have been considered in the assessment of probable cause for arrest for trespass").

To be sure, years *after* the arrests here, the District of Columbia Court of Appeals held that the government must prove, as an element of criminal trespass, that a defendant "knew or should have known that his entry was unwanted." *Ortberg*, 81 A.3d at 308. It explained that "the existence of a reasonable, good faith belief is a valid defense precisely because it precludes the government from proving" this fact. *Id.* at 309. But a reasonable officer need not have anticipated this decision. The *Ortberg* court recognized that prior cases upon which it relied "lacked some precision" and were "less clear" about the culpable mental state than about the *actus reus*. *Id.* at 307. It also noted that prior cases had referenced "general intent" but that this term has caused "a good deal of confusion" and "fails to distinguish between elements of the crime, to which different mental states may apply." *Id.*

Further, even *Ortberg* did not explain how its analysis made sense of the requirement in the case law that the defendant have entered the premises in question not only "with a bona fide belief of his right to enter," but also "with a good purpose." *Id.* at 308 & n.9; *see McGloin*, 232 A.2d at 91; *Bowman v.*

United States, 212 A.2d 610, 611-12 (D.C. 1965). Because entry of a premises on a bona fide belief of invitation but without a good purpose would not have been sufficient before *Ortberg*, a reasonable officer could have concluded that a reasonable, good-faith belief in the right of entry constituted an affirmative defense that did not go to an element of the crime. This reasonable officer could assess probable cause without having to predict that *Ortberg* or the court of appeals here would say otherwise.

c. It is important to ensure that an officer's probable-cause inquiry need not venture into such legal thickets, especially because they are commonplace. This Court often needs to clarify the elements of criminal offenses. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2367-73 (2016) (interpreting what "official act" is required for bribery). It has also cautioned that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey*, 444 U.S. 394, 403 (1980). The probable-cause inquiry does not require that on-scene officers wrestle with these legal difficulties. *See, e.g.*, *United States v. Smith*, 459 F.3d 1276, 1292 (11th Cir. 2006) (finding probable cause where an officer "could reasonably have believed that the sexually explicit photographs of what he observed to be very young girls were evidence of a [federal or state] crime . . . without knowing whether the legal technicalities of those crimes had, in fact, been satisfied").

It is for the prosecutor—and ultimately the finder of fact—to analyze the evidence in light of the specific offense elements. The role of the police officer is to initiate the process, by taking the person into custody so that the determination can be made whether or

not to bring criminal charges. In taking custody of the person, the officer need not even correctly identify a specific offense that he or she believes has been committed. *Devenpeck v. Alford*, 543 U.S. 146, 152-56 (2004). Rather, the charging decision is left to prosecutors, who can conduct the proper legal analysis. An arrest can also facilitate the gathering of additional evidence. 2 Wayne R. LaFave, *Search & Seizure* § 3.2(e) (5th ed. 2016). If the prosecutor brings charges, the judicial process will finally resolve any legal questions about what precisely the government must prove and whether the evidence suffices.

This approach upholds this Court's repeated pronouncement that the probable cause standard is a "practical, non-technical conception." *E.g.*, *Pringle*, 540 U.S. at 370. Here, the officers knew that all of the partiers had completed the physical act of trespassing. They also knew that criminal trespass, whatever its mental-state requirements, had certainly been committed at least by "Peaches," who had entered the house earlier despite knowing that no one had authority to be there. Moreover, "Peaches" was not acting alone, but in concert with the partiers, by having the party at the house. Given the totality of the circumstances—many quite suspicious—a reasonable officer could conclude that the partiers too had committed the crime. That conclusion did not need to be grounded in a technical, lawyerly analysis of the offense. It is enough that it be based in the practical judgments that experienced, on-scene officers can reasonably make when they have detected apparent criminal activity.

II. Alternatively, The Officers Are Entitled To Qualified Immunity Because The Law Was Not Clearly Established That An Arrest Under These Facts Lacked Probable Cause.

Even if the arrests were without probable cause, the officers involved are entitled to qualified immunity. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It applies if "a reasonable officer could have believed [the arrests] to be lawful, in light of clearly established law and the information the arresting officers possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (brackets omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Id.* Because the court of appeals denied the officers' defense to the common-law false arrest claim for "essentially the same reasons" as it denied qualified immunity (Pet. App. 30a), none of the liability findings can stand.[4]

---

[4] Before the court of appeals, respondents agreed—or at least did not dispute—that if qualified immunity applied, the arrests would also be privileged under common law. (*See* C.A. Appellants' Br. 38-39; C.A. Appellees' Br. 37.) Similar to qualified immunity, the common-law privilege precludes liability if "the arresting officer believed, reasonably and in good faith, that probable cause existed," even though that belief was mistaken. *Minch v. District of Columbia*, 952 A.2d 929, 937 (D.C. 2008). Here, the only reason given for denying the common-law privilege was the preceding denial of qualified immunity: that officers acted unreasonably in light of clearly established law. (Pet. App. 30a.) Moreover, if the arrests were privileged, the common-law negligent supervision would fail along with the common-law false arrest claim. The court of appeals held the District of Columbia liable for

1. In discussing qualified immunity, this Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). Rather, this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

The court of appeals failed to follow these instructions on qualified immunity. It reasoned that the law was clearly established in that: (1) probable cause requires "some evidence" of each offense element, including the mental state requirement; and (2) the mental state requirement for trespassing is whether the person "knew or should have known that his entry was unwanted." (Pet. App. 23a.) These two generalized propositions did not give fair notice to the officers whether probable cause to arrest existed in the specific situation they confronted: persons behaving suspiciously at a large party inside a vacant home, late at night, where the lawful owner disclaims their right to be there, but the suspects claim that they were invited by an admitted trespasser who is not present and is uncooperative and untruthful with police.

---

negligent supervision because Sergeant Suber supposedly "overstepped clear law in directing the arrests." (Pet. App. 3a.) Because the allegedly "negligent supervision" was nothing more than Sergeant Suber's order to arrest, for which he too deserved the benefit of the common-law privilege, the negligent supervision claim was not "separate and distinct" from the false arrest claim. *See Stewart-Veal v. District of Columbia*, 896 A.2d 232, 235-36 (D.C. 2006).

Like any officer on the scene, Officers Parker and Campanale could have reasonably believed that there was probable cause. They both learned that these late-night partiers had no right to be in the home; indeed, Officer Parker learned this directly from the home-owner. (J.A. 99, 131.) The officers further learned that the house was supposed to be vacant and observed its unfurnished and disordered condition. (J.A. 96-97, 112, 131.) Each of them smelled marijuana and saw, or were told of, facts suggestive of prostitution. (J.A. 73-74, 96-98, 131; C.A. App. 87.) Some partiers claimed to the officers that they had been invited by "Peaches," while others claimed that they had been invited by someone else. (J.A. 97, 135.) And the officers were aware that "Peaches" refused to return to the house and that her own claim that she had the owner's permission was false and misleading. (J.A. 75, 99, 131-32, 165-66.) Probable cause was at least arguable under these facts.

Neither the court of appeals nor the district court cited any case that had found probable cause lacking under even remotely analogous circumstances. Even if it were clearly established that police had to have "some evidence" that the partiers "knew or should have known" that their entry was unwelcome, this in no way suggested that the circumstantial evidence in this case was insufficient. The circumstantial evidence that the officers had here was at least arguably—if not certainly—"some evidence" of the partiers' culpable mental state. This is especially so when the culpable mental state was merely that the partiers "should have known" that their entry was unwanted, even if they did not in fact know.

In fact, the court of appeals went beyond requiring just "*some* evidence" but instead ultimately required

"probable cause" on each "necessary element." (Pet. App. 9a, 12-13a, 108a.) But it did not even assert that it was clearly established that probable cause is necessary for each element of a crime, rather than for the crime as a whole. Indeed, prior to the decision in this case, the District of Columbia Circuit had suggested otherwise, requiring probable cause with regard to a mental-state element only where the element involved, unlike here, "specific intent." *United States v. Christian*, 187 F.3d 663, 666-67 (D.C. Cir. 1999) (citing *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) (recognizing generally that "an officer need not have probable cause for every element of the offense")); *see Spiegel v. Cortese*, 196 F.3d 717, 725 n.1 (7th Cir. 2000) (explaining that it "is not the law" that police must "establish probable cause as to each and every element of a crime").

Moreover, the generalized propositions upon which the court of appeals said it relied, at least as it applied them, were not even clearly established. As discussed, it was not clearly established that an on-scene officer had to accept a suspect's claim of an innocent mental state when reasonable grounds existed to doubt the claim's credibility. (*See supra* at 27-35.) Nor was it clearly established at the time that the particular claim here of an innocent mental state related to an offense element, as opposed to an affirmative defense to be raised at trial. (*See supra* at 36-40.)

Far from clearly establishing the unlawfulness of the arrests, decisions of the District of Columbia Court of Appeals supported (and continue to support) the officers' actions. Those decisions have found probable cause to arrest under similar facts. *See Culp*, 486 A.2d at 1177 (trespassing in vacant home). Moreover, they have also upheld trespassing *convictions* even though

the accused had offered an innocent explanation for being on the property. *See Kozlovska v. United States*, 30 A.3d 799, 800-03 (D.C. 2011) (upholding the conviction of a woman previously barred from a building despite her unrebutted testimony that the superintendent permitted her to use the building, since the factfinder was free to disbelieve her testimony); *Artisst*, 554 A.2d at 330 & n.1 (upholding a conviction even though the accused claimed that he had entered dormitory to buy soccer equipment from a resident and thus lacked the requisite intent); *McGloin*, 232 A.2d at 90-91 (upholding the conviction of a person found in non-public areas of a private apartment building though he told police that he was looking for a cat or a friend who lived in the building). Especially where such evidence has been held to permit a conviction, a reasonable officer could have concluded here that it satisfied the much lower standard of probable cause.

Other decisions of the District of Columbia Court of Appeals had also found probable cause to arrest despite a suspect's claim or evidence of an innocent mental state. *Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 95-97 (D.C. 1997) (evidence suggesting mistaken entry into a restricted area of a transit station where the gate normally demarcating the area was missing and the suspect promptly turned around); *Nichols v. Woodward & Lothrop, Inc.*, 322 A.2d 283, 285-86 (D.C. 1974) (claim of lack of intent to steal because intent was to return the item); *Prieto v. May Dep't Stores Co.*, 216 A.2d 577, 578-79 (D.C. 1966) (claim of lack of intent to steal because continued possession of the item was inadvertent). As *Tillman* summarized: "it would be an unusual case where the circumstances, while undoubtedly proving an unlawful act, nonetheless demonstrated so clearly that the

suspect lacked the required intent that the police would not even have probable cause for an arrest." 695 A.2d at 96. Relying on these cases, a reasonable officer could have believed respondents' arrests were lawful.

2. At a minimum, it is "crystal clear" that "[n]o decision prior to the panel opinion here had *prohibited* an arrest under D.C. law in these circumstances." (Pet. App. 136a.) The court of appeals acknowledged as much but then declared: "that is not the applicable standard" for qualified immunity. (Pet. App. 22a.) Of course, as it noted, there is no need that "the very action in question have previously been held unlawful," and officers can violate clearly established law "even in novel factual circumstances." (Pet. App. 22a-23a (citing *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002))). But the denial of qualified immunity still requires that in "light of pre-existing law the unlawfulness [of the officer's actions] must be apparent." *Hope*, 536 U.S. at 739 (quoting *Anderson*, 483 U.S. at 640). Existing precedent must have placed the constitutional question the officers confronted "beyond debate." *Mullenix*, 136 S. Ct. at 308.

Existing precedent did not establish "beyond debate" that probable cause was lacking here. This is far from the "novel" or "obvious" factual situation where general constitutional principles might suffice to give an official fair notice of the unlawfulness of his or her conduct. *Cf. Hope*, 536 U.S. at 734-35, 741 (involving the handcuffing of a prisoner to a hitching post in a painful position for several hours in the hot sun, shirtless, with little water and no bathroom breaks). Police officers often encounter the general type of situation here, where suspects offer innocent state-of-mind explanations for trespassing and other apparent

criminal behavior. As discussed, the existing precedent in the District of Columbia addressing these circumstances supported, not undermined, probable cause. And four judges of the District of Columbia Circuit, considering the facts of this particular case, thought that there *was* probable cause. (Pet. App. 122a, 138a.) An officer cannot be deemed "plainly incompetent" for having shared their view. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (recognizing that eight court of appeals judges agreed with the government official); *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

If even needed, a review of case law beyond the District of Columbia further shows no "obvious" constitutional violation. The most analogous cases have found probable cause to arrest for trespassing despite the suspect's innocent explanation. For example, the Second Circuit held that probable cause was "easily met" even though the suspect claimed her entry was privileged because "she had legal title to the residence," she "was removing only her own property," and her "attorney told her she could do so." *Finigan*, 574 F.3d at 60-63. Likewise, the Third Circuit upheld a trespassing arrest even though the officer "may have made a mistake" in disbelieving the suspect's reasonable explanation; as the court explained, probable cause does not require that officers' "determinations of credibility were, in retrospect, accurate." *Wright v. City of Phila.*, 409 F.3d 595, 603 (3d Cir. 2005). Officers could also have drawn support from the abundant case law giving them wide latitude to discount innocent state-of-mind explanations (*see supra* at 27-33), as well as from this Court's decisions, including *Pringle*.

3. Officers Parker and Campanale's reasonable reliance on their supervisor's directive further supports qualified immunity. When Sergeant Suber ordered the arrests, these two officers already knew of facts at least arguably supporting a charge of unlawful entry. (*See supra* at 44.) They also knew that Sergeant Suber and other officers on the scene had been gathering additional facts as part of a thorough investigation. (J.A. 75, 93-95, 100, 131-32.) Where an on-scene supervisor finds probable cause to arrest based on the collective information available to the police, it is generally reasonable for subordinate officers to comply with this determination. Nothing suggested otherwise to the two defendant officers here. This is another factor favoring qualified immunity. *See Messerschmidt v. Millender*, 565 U.S. 535, 554-55 (2012) (explaining that the pre-approval of superiors "is certainly pertinent in assessing whether [the officers] could have held a reasonable belief that the warrant was supported by probable cause"); *Liu v. Phillips*, 234 F.3d 55, 57 (1st Cir. 2000) (holding that an officer "may reasonably rely on a fellow officer or agent who does (or by position should) know the substantive law and the facts and who (based on that knowledge) asserts that an offense has been committed").

* * *

As Judge Kavanaugh recognized, the court of appeals' decision "did what the Supreme Court has repeatedly told [the lower courts] not to do: [it] created a new rule and then applied that new rule retroactively against the police officers." (Pet. App. 136a.) It is unfair to impose an award of over $1 million on the officers simply because they did not—and could not—anticipate the court of appeals' decision here. That

decision will also have a broad chilling effect on law enforcement officers when making on-the-scene credibility judgments, adversely affecting their everyday ability to do their jobs and protect the public. Given the unfairness to the officers here and "the importance of qualified immunity 'to society as a whole,'" *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015), the Court should correct the improper imposition of liability in this case.

CONCLUSION

The Court should reverse the judgment below and direct the entry of summary judgment for the defendants or, alternatively, further proceedings.

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE
ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

Counsel for Petitioners

May 2017

RECORD AND BRIEFS

FILED
JUL 12 2017

No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

THEODORE WESBY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the DC Circuit

BRIEF FOR RESPONDENTS

GREGORY L. LATTIMER
1200 G Street NW
Washington, DC 20005

CHARLOTTE H. TAYLOR
JULIA FONG SHEKETOFF
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939

NATHANIEL P. GARRETT
Counsel of Record
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
(415) 626-3939
ngarrett@jonesday.com

Counsel for Respondents

QUESTIONS PRESENTED

District of Columbia police officers arrested for unlawful entry over sixteen individuals, Respondents here, attending a house party. At the scene, guests informed the officers that the party's host, a woman whom they believed to be a lawful tenant, had invited them to the house. That woman confirmed to the officers that she had issued such an invitation. Disputed evidence suggests, however, that one officer later learned that the woman was not a lawful tenant and that the landlord had not authorized Respondents' entry. The questions presented are:

1. Whether the officers were properly denied qualified immunity at the summary-judgment phase because, based on the evidence as construed in Respondents' favor, it would have been clear to any reasonable officer that probable cause for unlawful entry required some evidence that Respondents knew or should have known that their entry was against the will of the lawful occupant or owner, and there was no such evidence.

2. Whether Respondents were properly granted summary judgment because, even when the evidence is construed in Petitioners' favor, the officers lacked probable cause under the Fourth Amendment to arrest Respondents for unlawful entry.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Factual Background 2

B. District Court Proceedings 5

C. Court of Appeals Proceedings 6

SUMMARY OF ARGUMENT 7

I. PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY WAS CORRECTLY DENIED 9

A. The Law Was Clearly Established That Probable Cause Requires Some Evidence of Every Element of the Crime 10

B. The Law Was Clearly Established That the Crime of Unlawful Entry in the District of Columbia Has a *Mens Rea* Element 17

C. Under This Clearly Established Law, a Reasonable Officer Would Have Known That There Was No Probable Cause To Arrest Respondents 25

1. In Evaluating Qualified Immunity, All Facts Must Be Viewed in Respondents' Favor 26

TABLE OF CONTENTS
(continued)

Page

2. The Police Had Affirmative Evidence of Respondents' Innocent Mental State 30

3. The Police Had No Evidence That Respondents Had a Guilty Mental State 32

D. Petitioners Distort the Qualified Immunity Inquiry 41

E. Petitioners' Reliance on Their Superiors' Order Was Not Objectively Reasonable 45

II. RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON PROBABLE CAUSE WAS CORRECTLY GRANTED 46

A. Parker's Conversation With Hughes Is Not Probative 47

B. The Alleged Tip Is Not Probative 49

C. Respondents' Alleged Flight Is Not Probative. 51

D. Respondents' Alleged Marijuana Use Is Not Probative 53

E. Peaches' Alleged Admission Is Not Probative 53

CONCLUSION 57

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Williams,
407 U.S. 143 (1972) 31

Aguilar v. Texas,
378 U.S. 108 (1964) 12

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 26

Artisst v. United States,
554 A.2d 327 (D.C. 1989) 20, 23, 44

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 16

Atwater v. City of Lago Vista,
532 U.S. 318 (2001) 13

Bailey v. United States,
568 U.S. 186 (2013) 10

Barham v. Salazar,
556 F.3d 844 (D.C. Cir. 2009) 45

Bean v. United States,
709 A.2d 85 (D.C. 1998) 18, 23

Beck v. Ohio,
379 U.S. 89 (1964) 50

BeVier v. Hucal,
806 F.2d 123 (7th Cir. 1986) 15

Bowman v. United States,
212 A.2d 610 (D.C. 1965) 17, 18

Brinegar v. United States,
338 U.S. 160 (1949) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Carr v. District of Columbia,
587 F.3d 401 (D.C. Cir. 2009) 16

Carroll v. United States,
267 U.S. 132 (1925) 31

Commonwealth v. Warren,
58 N.E. 3d 333 (Mass. 2016) 52

Culp v. United States,
486 A.2d 1174 (D.C. 1985) ..... *passim*

Darab v. United States,
623 A.2d 127 (D.C. 1993) 22

Dixon v. United States,
548 U.S. 1 (2006) 21

Ex parte Burford,
7 U.S. (3 Cranch) 448 (1806) 10

Figueroa v. Mazza,
825 F.3d 89 (2d Cir. 2016) 42, 43

Finigan v. Marshall,
574 F.3d 57 (2d Cir. 2009) 42

Florida v. Harris,
568 U.S. 237 (2013) 11, 47

Garcia v. Does,
779 F.3d 84 (2d Cir. 2015) 43

Gardenhire v. Schubert,
205 F.3d 303 (6th Cir. 2000) 32

Gasho v. United States,
39 F.3d 1420 (9th Cir. 1994) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Gerstein v. Pugh,
420 U.S. 103 (1975) 31

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001) 56

Griffin v. Sirva Inc.,
835 F.3d 283 (2d Cir. 2016) 56

Guzell v. Hiller,
223 F.3d 518 (7th Cir. 2000) 32

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 41

Hebert v. Maxwell,
214 F. App'x 451 (5th Cir. 2007) 15

Heien v. North Carolina,
135 S. Ct. 530 (2014) 24, 25

Henry v. United States,
361 U.S. 98 (1959) ..... *passim*

Hope v. Pelzer,
536 U.S. 730 (2002) 9, 42

Illinois v. Wardlow,
528 U.S. 119 (2000) 51

In re Winship,
397 U.S. 358 (1970) 22

Jackson v. United States,
357 A.2d 409 (D.C. 1976) 18, 21

Jurkowitsch v. Choudhury,
673 F. App'x 44 (2d Cir. 2016) 50

TABLE OF AUTHORITIES
(continued)

Page(s)

Kozlovska v. United States,
30 A.3d 799 (D.C. 2011) 44

Leiss v. United States,
364 A.2d 803 (D.C. 1976) 17, 24

Liser v. Smith,
254 F. Supp. 2d 89 (D.D.C. 2003) 41

Manuel v. City of Joliet,
137 S. Ct. 911 (2017) 11, 13

Martin v. City of Struthers,
319 U.S. 141 (1943) 18, 19

Maryland v. Pringle,
540 U.S. 366 (2003) 15, 16, 54, 55

Massachusetts v. Upton,
466 U.S. 727 (1984) (per curiam) 50

McGloin v. United States,
232 A.2d 90 (D.C. 1967) 23, 44

Michigan v. DeFillippo,
443 U.S. 31 (1979) 13

Mitchell v. City of New York,
841 F.3d 72 (2d Cir. 2016) 15, 37

Morrisette v. United States,
342 U.S. 246 (1952) 14

Nichols v. Woodward & Lothrop, Inc.,
322 A.2d 283 (D.C. 1974) 44

Ortberg v. United States,
81 A.3d 303 (2013) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Patterson v. New York,
432 U.S. 197 (1977) 12

Payton v. New York,
445 U.S. 573 (1980) 13

Pearson v. Callahan,
555 U.S. 223 (2009) 9

Phillips v. Wash. Legal Found.,
524 U.S. 156 (1998) 20, 22

Prieto v. May Dep't Stores Co.,
216 A.2d 577 (D.C. 1966) 44

Recznik v. City of Lorain,
393 U.S. 166 (1968) 50

S.E.C. v. Koracorp. Indus., Inc.,
575 F.2d 692 (9th Cir. 1978) 28

Safford Unified Sch. Dist. No. 1 v. Redding,
557 U.S. 364 (2009) 9

Saucier v. Katz,
533 U.S. 194 (2001) 41

Sibron v. New York,
392 U.S. 40 (1968) 51

Smith v. United States,
281 A.2d 438 (D.C. 1971) ..... *passim*

Smith v. United States,
568 U.S. 106 (2013) 21

Star Athletica, L.L.C. v. Varsity Brands, Inc.,
137 S. Ct. 1002 (2017) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Thomas v. Great Atl. & Pac. Tea Co.,
233 F.3d 326 (5th Cir. 2000) 27

Tillman v. Wash. Metro. Area Transit Auth.,
695 A.2d 94 (D.C. 1997) 44

Tolan v. Cotton,
134 S. Ct. 1861 (2014) (per curiam)..... 26, 30, 56

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 57

United States v. Aguilar,
515 U.S. 593 (1995) 49

United States v. Brown,
294 A.2d 499 (D.C. 1972) 16

United States v. Christian,
187 F.3d 663 (D.C. Cir. 1999) 16

United States v. Cortez,
449 U.S. 411 (1981) 53

United States v. Davis,
809 F.2d 1509 (11th Cir. 1987) 4

United States v. Di Re,
332 U.S. 581 (1948) 14

United States v. Joseph,
730 F.3d 336 (3d Cir. 2013)..... 15

United States v. Lanier,
520 U.S. 259 (1997) 9

United States v. Montague,
75 F. Supp. 2d 670 (S.D. Tex. 1999) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Mousli,
511 F.3d 7 (1st Cir. 2007) 49

United States v. O'Brien,
560 U.S. 218 (2010) 12

United States v. Ortiz,
422 U.S. 891 (1975) 20, 54

United States v. Ventresca,
380 U.S. 102 (1965) 12

Whiteley v. Warden, Wyo. State Penitentiary,
401 U.S. 560 (1971) 12, 50

Williams v. City of Alexander,
772 F.3d 1307 (8th Cir. 2014) 14, 15

Wong Sun v. United States,
371 U.S. 471 (1963) 12, 51

Wright v. City of Phila.,
409 F.3d 595 (3d Cir. 2005) 43

Ybarra v. Illinois,
444 U.S. 85 (1979) 53, 55

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. amend. IV ..... *passim*

42 U.S.C. § 1983 ..... 5, 40

D.C. Code § 22-3302 (2007) 17, 20, 40

OTHER AUTHORITIES

30 & Over House Party & Cookout Crew 34

TABLE OF AUTHORITIES
(continued)

Page(s)

Erica Avesian, *A Freshman Girl's Guide to Frat Parties* 34

Barbara E. Bergman, *Criminal Jury Instructions for the District of Columbia* (Matthew Bender, Rev. Ed.) 18

David Brunow, et al., Throwing a House Party 34

Consumer Spending in River Terrace, Point2Homes 38

Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, Fast Focus, Mar. 2015 39

Paul Duggan, *Study: D.C. Gentrification Can Cause Pockets of Poverty to Grow, Especially East of Anacostia River*, Wash. Post, Nov. 23, 2016 39

Benjamin Freed, *DC Sues Owner of Airbnb House Often Used for Parties*, Washingtonian, May 8, 2015 34

Government of District of Columbia, Marijuana in the District of Columbia 53

How to Get Invited to a Party, WikiHow 35

How to Throw an Amazing College Party, WikiHow 35

TABLE OF AUTHORITIES
(continued)

Page(s)

Christopher Ingraham, *11 Charts That Show Marijuana Has Truly Gone Mainstream*, Wash. Post, Apr. 19, 2017 53

Laura Klairmont, *Tackling Poverty in Nation's Capitol, One Bed at a Time*, CNN, Apr. 21, 2015 38

Wayne R. LaFave, 3 Subst. Crim. L. (2d ed. 2016) 19

Eric Levenson & Arit John, *How the Kids Do It Now: Partying*, The Atlantic, Apr. 9, 2014 34

Debby Mayne, *How to Host an Open House Party*, The Spruce, Jan. 30, 2017 35

Model Penal Code (1980) 19

Rich Morin & Renee Stepler, *The Radical Confidence Gap in Police Performance*, Pew Research Center, Sept. 29, 2016 51

National Institute of Health, Alcohol Facts and Statistics 35

Neighborhood Info DC, DC Zip Code Profile—Well-Being 38

Stripper, Wikipedia 36

Strippers Said to Be Commonplace At Football-Recruit Parties, Fox News, Feb. 10, 2004 34

TABLE OF AUTHORITIES
(continued)

Page(s)

Sup. Ct. R. 14.1(a) 11

Theresa Vargas & Kimbriell Kelly, *"It Made Me Hate the Police": Ugly Encounters with Officers Fuel Loss of Trust, Costly Payouts*, Wash. Post, Jan. 8, 2017 ..... 51, 52

Timothy Williams, *Study Supports Suspicion That Police Are More Likely to Use Force on Blacks*, N.Y. Times, July 7, 2016 51

Washington, DC House Party Events, Eventbrite 34

INTRODUCTION

This case is not about whether police may discredit self-serving statements of someone they suspect of a crime. Respondents and Petitioners both agree that, when the circumstances reasonably give them a basis, police may do so. Nor is this case about whether police may rely on circumstantial evidence to establish probable cause for an arrest. Respondents and Petitioners, again, both agree that they may.

Instead, this case is about whether, in the particular circumstances here, the police had a basis to disregard Respondents' particular statements. It is about whether the particular circumstantial evidence available to the officers here was evidence that Respondents committed unlawful entry. The answer to these very specific questions is no. In the unique circumstances presented here—and particularly when the evidence is viewed in the light most favorable to Respondents, as is required on Petitioners' motion for summary judgment—a reasonable officer could not discredit Respondents' statements and could not conclude that there existed probable cause to arrest.

Given the clarity of the law at the time of the arrests, a reasonable officer would have known both that probable cause requires some evidence on every element of a crime and that one element of the crime of unlawful entry is that the arrestee know or should know he is on property against the will of the owner. A reasonable officer would have concluded that he lacked *any* evidence that Respondents knew or should have known they were on property against the owner's will. Indeed, the evidence against

Respondents was simply that they were guests at a lawful (though bawdy) house party, in an inelegantly furnished home, and that they partook in the party festivities. There was disputed evidence that their host's lease negotiations had stalled, but there was no basis to conclude Respondents knew or should have known that. This is not evidence of knowing trespass. The Court should therefore affirm the judgment in Respondents' favor, or at minimum affirm the denial of qualified immunity to Petitioners and remand for trial to resolve the disputed factual issues.

STATEMENT OF THE CASE

A. Factual Background.

Petitioners seek review of the parties' cross-motions for summary judgment, and so the record shifts as each side's motion is alternately considered.

On review of Petitioners' motion, the following facts are taken as true: On Saturday, March 15, 2008, Respondents attended a house party in River Terrace, a low-income, predominantly African-American neighborhood in Washington, D.C. J.A. 112. The police arrived at the house, located at 115 Anacostia Avenue, N.E., in the early morning hours of March 16. J.A. 112, 189. They knocked on the front door, and the partiers opened it. J.A. 143. The police entered to find a number of partiers sitting on chairs or standing around in the living room, listening to music on the stereo at a low volume, and drinking. J.A. 37, 96-97, 114, 165; C.A. App. 82. There were strippers. J.A. 37, 115. When the police explored the rest of the house (with guns drawn),

they found other partiers hanging out in a bedroom, eating and talking. J.A. 46-50, 96, 177.

The house was furnished (if inexpensively). Apart from the chairs and stereo in the living room, there was a bed in the bedroom, shades on the windows, a fully supplied bathroom, and food in the refrigerator. J.A. 41; C.A. App. 82. There were candles set out, a few lights on, and normal plumbing. J.A. 45, 52, 96. The house looked like someone had moved in recently, as indeed the host had. J.A. 35-36, 41.

When the police asked the partiers why they were present, they explained that a woman called Peaches (who also went by Tasty) was hosting a party in the house, and that they were there at Peaches' (or her guests') invitation. J.A. 36, 53, 97, 131, 135, 165. Peaches had gone to the store, but the police contacted her by phone. J.A. 165. Peaches confirmed to the officers that she had invited the partiers and explained that that she was the lawful tenant of the house. J.A. 53-54, 100. She also gave them the contact information of Damien Hughes, the personal representative of the deceased owner of the house (Henry Hughes). J.A. 105; C.A. App. 68, 91-94. The police nonetheless arrested everyone for unlawful entry. J.A. 75-76, 100.

In short, on Petitioners' motion for summary judgment, Respondents were arrested simply for attending a typical (albeit licentious) house party.

Petitioners' narrative of the events adds a number of disputed facts, which are taken as true *only* on review of Respondents' motion for summary judgment. These facts are: The police came to the house after receiving a tip that there were

unspecified "illegal activities" going on inside, that there was loud noise, and that the house was supposed to be vacant. J.A. 94, 98-99, 111-12, 131. When the police arrived at the house and knocked on the front door, an officer saw some people inside scatter. J.A. 143. Upon entering the house, the officers smelled marijuana and found opened condom wrappers. J.A. 97, 112, 131, 165. The house was in disarray. J.A. 112. An officer reported finding someone hiding in a closet. J.A. 177.[1]

When the police spoke with Peaches by phone, she confirmed that she had invited Respondents to the house, and that she had permission to be there because she was renting it. J.A. 53, 100. But she later admitted that she did not have permission. J.A. 54. Peaches then put the police in touch with Hughes, who told them that Peaches lacked permission to live in the house or to invite others to party there. J.A. 99-100, 105-06, 165-66. He reported that, although he and Peaches were trying to work out a lease, they had not yet reached an

---

[1] One officer also testified that he was told by an unidentified person that another unidentified person was selling sex upstairs. J.A. 73-74. Given that this officer never went upstairs, the officers who did go upstairs reported nothing like this, the police report makes no mention of such an allegation, and Petitioners never considered arresting Respondents for prostitution, J.A. 73-74, 112, this vague, second-hand report is too fantastical to credit even on Petitioners' motion for summary judgment. *See, e.g.*, *United States v. Davis*, 809 F.2d 1509, 1513 (11th Cir. 1987) (noting that where evidence is "so fantastic, so internally inconsistent, or so speculative[,] it ha[s] no probative value" and is "insufficient to present a question for the jury").

agreement. J.A. 99. The police then arrested Respondents. J.A. 166.

B. District Court Proceedings.

Respondents (sixteen arrestees) sued Petitioners (the District of Columbia, Officer Andre Parker, and Officer Anthony Campanale), alleging that the officers lacked probable cause to arrest and asserting claims for false arrest under 42 U.S.C. § 1983 and related common-law claims. Pet. App. 6a. Respondents moved for partial summary judgment on probable cause, and Petitioners cross-moved on both probable cause and qualified immunity grounds.

On probable cause, the district court granted judgment to Respondents. It concluded that, to commit unlawful entry, a person must know or have reason to know that he is on another's property against that person's will. And because Petitioners were aware that Peaches had invited Respondents to the house, Petitioners had no basis to conclude that Respondents knew or should have known they were present against the owner's will. Pet. App. 64a.

On qualified immunity, the district court denied Petitioners' motion. Although Petitioners had argued that the law was unclear on the elements of unlawful entry, the court disagreed: "For many decades preceding these arrests, District of Columbia law has consistently provided that probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner or authorized agent." Pet. App. 74a. The court also held that it was unreasonable for Petitioners Parker and Campanale to rely on their superiors' orders,

since Petitioners knew Peaches had given permission to enter the house. Pet. App. 78a.

The case proceeded to a damages-only trial, and the jury awarded Respondents $680,000 in damages. Pet. App. 121a. Petitioners appealed. C.A. App. 515.

C. Court of Appeals Proceedings.

The court of appeals affirmed. On probable cause, the panel agreed with the district court that the crime of unlawful entry has a *mens rea* requirement (that the trespasser know or have reason to know he is present against the owner's will). And it agreed that the officers had an insufficient basis to conclude that Respondents had that mental state, given the undisputed evidence that Peaches had invited them to the house. Pet. App. 11a. As the court put it, "the evidence is uniform that the arrestees all were invited, and there is simply no evidence in the record that [Petitioners] had any reason to think the invitation was invalid." Pet. App. 12a.

On qualified immunity, the court of appeals found that "controlling case law in this jurisdiction . . . made perfectly clear at the time of the events in this case that probable cause required some evidence that [Respondents] knew or should have known that they were entering against the will of the lawful owner." Pet. App. 23a-24a. And because the evidence was uncontroverted that Respondents had a basis to believe they had entered at the invitation of a lawful occupant, "no reasonable officer could have believed there was probable cause to arrest [Respondents]." Pet. App. 22a. Judge Brown dissented. Pet. App. 32a. Petitioners unsuccessfully sought rehearing en banc. Pet. App. 104a.

SUMMARY OF ARGUMENT

I. Petitioners' motion for summary judgment on their qualified immunity defense was properly denied. Precedent at the time of the arrest clearly established that probable cause requires some evidence of every offense element, particularly a state-of-mind element, and that the District of Columbia's unlawful entry statute includes such a state-of-mind element. Thus, in the circumstances here, viewed in the light most favorable to Respondents as required, Petitioners could not reasonably have concluded they had probable cause to arrest for unlawful entry.

Well-worn Fourth Amendment principles establish that probable cause requires a factual basis for concluding that a crime has been committed, which requires at least some evidence supporting each element of a crime. This Court has never approved an exception to this rule for "on-scene" officers. To the contrary, the probable cause inquiry is, if anything, *more* stringent when on-scene officers make a warrantless arrest than when a neutral magistrate issues an arrest warrant. And there is no basis for treating *mens rea* differently from other elements of a crime. Because a culpable mental state is the defining attribute of criminal behavior, courts have singled out evidence supporting *mens rea* as particularly necessary to probable cause.

Settled law in the District of Columbia has also established that the crime of unlawful entry has a *mens rea* element. One must know or have reason to know that he is on property against the will of its lawful occupant or owner to violate the law. This *mens rea* requirement is an element of unlawful entry, not an affirmative defense.

To arrest for unlawful entry, therefore, Petitioners were required to have at least some evidence that Respondents knew or should have known that they entered the house against the will of the lawful occupant or owner. It would have been obvious to any officer aware of these legal principles that he lacked probable cause to arrest Respondents. Construing the record in favor of Respondents, the factual basis for their arrest was simply that they were invited guests at a standard, though debauched, house party in a cheaply furnished house in a poor neighborhood. Certainly Petitioners are entitled to point to circumstantial evidence in the probable cause inquiry. But whatever the form of the evidence, it must provide an affirmative basis to conclude that someone committed a crime. The evidence here does not.

II. Respondents' motion for summary judgment on liability was properly granted. Even construing the record in Petitioners' favor, as required on Respondents' motion, Petitioners lacked probable cause to arrest. Viewing the record in this light does not change the fundamental character of the evidence: Respondents came to a party, and it turned out the host of the party failed to finalize a lease with the landlord. Absent reason to conclude that Respondents interrogated (or should have interrogated) their host about her leasing arrangements, as the police ultimately did, there remains no basis to conclude Respondents satisfied the unlawful entry statute's *mens rea* requirement. Accordingly, Respondents were entitled to summary judgment on liability, and this Court should affirm.

At a minimum, however, this Court should remand for trial. Petitioners' cross-motion for summary judgment relies on a host of disputed facts that, when resolved in Respondents' favor, preclude a finding of probable cause.

I. PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY WAS CORRECTLY DENIED.

Petitioners ask this Court to enter summary judgment in their favor on qualified immunity grounds, but Petitioners' motion was properly denied.

The qualified immunity "inquiry turns on the objective legal reasonableness of [Petitioners'] action[s], assessed in light of the legal rules that were clearly established at the time [they were] taken." *Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009). To be clearly established there is no need that "the very action in question have previously been held unlawful." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009). It is sufficient, rather, if "prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *United States v. Lanier*, 520 U.S. 259, 269 (1997); *accord Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (qualified immunity unavailable where the law gave officers "fair warning" that their conduct was unconstitutional).

Here, given established law, it would have been clear to a reasonable officer that probable cause requires evidence of every element of a crime, including *mens rea* where applicable. It also would have been clear that the crime of unlawful entry in the District of Columbia has a *mens rea* element.

And it would have been clear that Petitioners lacked evidence that Respondents met the *mens rea* requirement—when viewing the evidence in Respondents' favor, as is required on review of Petitioners' motion for summary judgment.

A. The Law Was Clearly Established That Probable Cause Requires Some Evidence of Every Element of the Crime.

At the time of Respondents' arrests, Fourth Amendment law was clear that probable cause requires *some* evidence on every element of the crime underlying the arrest, and that *mens rea* is no exception.

1. This Court's precedents on probable cause are long-established. The Fourth Amendment protects "the right of the people to be secure in their persons . . . against unreasonable . . . seizures." U.S. Const. amend. IV. As this Court has held, "the general rule" is that an arrest is reasonable under the Fourth Amendment "only if based on probable cause to believe that the individual has committed a crime." *Bailey v. United States*, 568 U.S. 186, 192 (2013). This means that an arrest requires sufficiently reliable evidence supporting the conclusion that the elements of a crime are all satisfied. *See Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806) (Marshall, C.J.) (arrest warrant was invalid where it "state[d] no offense" and "[did] not allege that [the arrestee] was convicted of any crime").

This proposition would require little explication, except that Petitioners argue that police officers operating in the field should not be required to "sort through the elements of an offense" and evaluate

whether each one is satisfied before making an arrest. Br. 35-36. Petitioners' position is that because the probable cause determination is a "fluid concept," police can arrest a citizen without "identifying every element . . . and weighing the available facts as to each." *Id.* at 35.

Petitioners did not argue below, as they do before this Court, that tethering probable cause to the elements of a crime requires too much of police officers. Nor did Petitioners dispute this issue in their petition for certiorari. Accordingly, this Court should decline to address it. *See* Sup. Ct. R. 14.1(a); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017). In any event, it is contrary to long-established constitutional principles.

While the probable cause inquiry is undoubtedly a "fluid," *Florida v. Harris*, 568 U.S. 237, 244 (2013), "practical," and "nontechnical" inquiry based on the totality of the circumstances, *Brinegar v. United States*, 338 U.S. 160, 176 (1949), that does not alter the basic requirement that probable cause for an arrest requires facts that "warrant a man of reasonable caution in the belief *that an offense has been or is being committed*." *Id.* at 175-76 (emphasis added); *see also, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (holding that the Fourth Amendment prohibits seizures without "probable cause to believe [the suspect] *committed a crime*") (emphasis added); *Henry v. United States*, 361 U.S. 98, 102 (1959) ("Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing *that the offense has been committed*") (emphasis added). And the specified elements of an offense constitute the irreducible

minimum of a crime. *See United States v. O'Brien*, 560 U.S. 218, 224 (2010); *Patterson v. New York*, 432 U.S. 197, 210 (1977). Accordingly, absent at least *some* evidence supporting every element of a crime, there is no probable cause, and an arrest violates the Fourth Amendment.

There is no exception to this rule for "on-scene" officers. To the contrary, police officers making warrantless arrests in the field are held, if anything, to a *more* exacting standard than officers seeking warrants from a judge. *E.g.*, *Aguilar v. Texas*, 378 U.S. 108, 111 (1964) ("[W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive power than would have justified an officer in acting on his own without a warrant."); *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 566 (1971) ("[T]he standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest . . . are at least as stringent as the standards applied with respect to the magistrate's assessment."); *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (similar). Arrest pursuant to a warrant is preferable, *United States v. Ventresca*, 380 U.S. 102, 106 (1965), and application of a less exacting standard for warrantless arrests "would discourage resort to the procedures for obtaining a warrant," *Whiteley*, 401 U.S. at 566.[2]

---

[2] Moreover, because the probable cause standard cuts across the criminal justice process, a holding diluting that standard would have far-reaching consequences. For example, it would

In keeping with these principles, this Court has approved warrantless arrests in the field where the facts and circumstances support probable cause for each element of a crime. For example, in *Michigan v. DeFillippo*, 443 U.S. 31, 36-37 (1979), the Court satisfied itself that an arrest pursuant to a municipal ordinance was properly supported by probable cause only after reviewing the elements of the statute and determining that the arresting officer had observed facts satisfying each. *See also, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding permissible a warrantless arrest for driving without a seatbelt because the arresting officer had observed that the statutory offense elements were satisfied).

But this Court has made plain that, where an officer makes a warrantless arrest on the basis of mere suspicious behavior or incomplete information, he violates the Fourth Amendment's probable cause requirement. For example, in *Henry*, this Court found no cause to arrest a man for possessing contraband despite suspicious behavior consistent with the crime. 361 U.S. at 102. Specifically, the police had received a report that liquor had been stolen, and they saw the man, together with someone who had been singled out by a confidential informant, repeatedly park in an alley to load cartons into a car, and later leave a tavern. *Id.* at 99. Yet "there was

---

(continued...)

allow law enforcement officials greater latitude in arresting suspects in their homes, *see Payton v. New York*, 445 U.S. 573, 576 (1980), and in imposing lengthy pretrial detentions, *see Manuel*, 137 S. Ct. at 920 & n.8.

nothing to indicate that the cartons here in issue probably contained" *contraband* specifically (an element of the crime), and thus no basis to arrest. *Id.* at 104. "Under our system suspicion is not enough for an officer to lay hands on a citizen." *Id.*

Accordingly, when on-scene officers make a warrantless arrest, they—like a magistrate judge issuing a warrant—must have a factual basis to conclude that a criminal, as opposed to an innocent, act has been committed.

2. The rule that probable cause requires evidence supporting all elements of a crime applies with especial force when the element in question is *mens rea*. It is a deeply-rooted precept that a person is not criminally responsible unless criminal intent accompanies the wrongful act. *Morrisette v. United States*, 342 U.S. 246, 250-51 (1952). Thus, well before the arrests in this case, this Court held that the Government lacked probable cause to arrest for *knowing* possession of a counterfeit coupon in the absence of information at least "hinting . . . at the knowledge and intent required as elements of the felony under the statute." *United States v. Di Re*, 332 U.S. 581, 592 (1948). Evidence on the other elements of the crime was not enough.

Based upon the "ancient requirement of a culpable state of mind," *Morrisette*, 342 U.S. at 250, numerous circuits have followed this Court in holding that probable cause requires some evidence of intent when it is an element. *See Gasho v. United States*, 39 F.3d 1420, 1429 (9th Cir. 1994); *see also Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014) ("For probable cause to exist, there must be probable cause

for all elements of the crime, including *mens rea*."); *United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013) ("To make an arrest based on probable cause, the arresting officer must have probable cause for each element of the offense," including *mens rea*); *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986) (holding that, to have probable cause under a statute requiring knowing or willful conduct, officers needed "some evidence" to satisfy this element).[3] Some courts of appeals have even had occasion to apply this principle in the exact context here, holding that evidence of *mens rea* is required to arrest for unlawful entry. *See, e.g.*, *Mitchell v. City of New York*, 841 F.3d 72, 78-79 (2d Cir. 2016); *Hebert v. Maxwell*, 214 F. App'x 451, 455 (5th Cir. 2007).

Petitioners ignore these cases, and instead rely on this Court's opinion in *Maryland v. Pringle*, 540 U.S. 366 (2003). But that case proves Respondents' point. In *Pringle*, this Court held that the police had probable cause to believe that the defendant, who was a passenger in a vehicle, committed the crime of

---

[3] Some of these courts have stated that probable cause—rather than simply some evidence—is required on a *mens rea* element. *E.g.*, *Williams*, 772 F.3d at 1312; *Joseph*, 730 F.3d at 342. Assuming there is a meaningful practical difference between a rule that probable cause is required for a given element and a rule that probable cause does not exist absent *some* evidence supporting every element, *cf.* Br. 35 (faulting court of appeals for requiring probable cause "as to each specific element"), Respondents' position is simply that some evidence supporting *mens rea* is needed. This modest proposition is amply supported by this Court's precedents, *see supra* at 11-15, and falls well within these arguably more stringent holdings of the courts of appeals.

knowing possession of cocaine. The Court reached that conclusion not because the police could ignore the *mens rea* element of the statute, but because the police could reasonably infer the defendant had knowledge of the cocaine, given that the cocaine and $763 in rolled-up cash were in the vehicle within his reach. *Id.* at 372. *Pringle* thus stands for the uncontested proposition that evidence of unlawful intent may be either circumstantial or direct. Respondents agree—but no matter the *type* of evidence, probable cause requires *some* evidence of *mens rea*.

3. At the time of the arrest, these legal principles were clearly settled in federal and local courts in the District of Columbia. Indeed, in *United States v. Brown*, the D.C. Court of Appeals held that an arrest for willfully failing to pay taxi fare was "premature" because evidence of "the element of scienter [was] lacking." 294 A.2d 499, 500 (D.C. 1972). Similarly, in *United States v. Christian*, the D.C. Circuit found no probable cause for possessing a dagger with the intent to use it unlawfully because the officers "lacked any evidence at all that [the suspect] intended to use the dagger unlawfully." 187 F.3d 663, 667 (D.C. Cir. 1999); *see also Carr v. District of Columbia*, 587 F.3d 401, 410-11 (D.C. Cir. 2009) (officers lacked probable cause to arrest for knowingly parading without a permit in absence of evidence that defendants knew no permit was issued). Petitioners—who perform their functions within a single jurisdiction and "so are expected to adjust their behavior in accordance with local precedent," *Ashcroft v. al-Kidd*, 563 U.S. 731, 745-46 (2011) (Kennedy, J., concurring)—should have been aware

of this law. These cases reaffirm the longstanding principle that officers cannot arrest absent evidence on every element of the crime, particularly the state-of-mind element.

B. The Law Was Clearly Established That the Crime of Unlawful Entry in the District of Columbia Has a *Mens Rea* Element.

The law was similarly clear at the time of the arrests that the crime of unlawful entry in the District of Columbia has a *mens rea* element: The arrestee must know or have reason to know he is present on someone else's property against that person's will. Petitioners dispute that this was the law—and claim that, in the alternative, they were reasonably mistaken about the statute's elements—but their arguments are controverted by long-established D.C. caselaw.

1. The District's unlawful trespass statute prohibits any person from entering a public or private dwelling "against the will of the lawful occupant or of the person lawfully in charge thereof." D.C. Code § 22-3302 (2007). D.C. courts have long recognized that, "[t]o be against the will of the lawful occupant the entry must be against the *expressed* will." *Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965) (emphasis added); *accord Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976).

To express his will, an owner must *explicitly* or *implicitly* warn others that they are unwelcome. For example, in *Bowman*, the owner explicitly manifested his will to exclude "by sign and by public announcement." 212 A.2d at 611. And in *Smith v.*

United States, the owner implicitly warned others to stay out by restricting access to his property with locked gates and a barbed wire fence. 281 A.2d 438, 439-40 (D.C. 1971). But when an owner leaves his property "unmarked or ambiguously marked," he fails to satisfy the statute's warning requirement. *Jackson v. United States*, 357 A.2d 409, 411 (D.C. 1976); *see also Culp v. United States*, 486 A.2d 1174, 1176-77 (D.C. 1985). The unlawful entry statute thus reflects the "traditional[]" American principle that the law of trespass "'punishes persons who enter onto the property of another after having been warned by the owner to keep off.'" *Bean v. United States*, 709 A.2d 85, 86 (D.C. 1998) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943)); *see also Bowman*, 212 A.2d at 611 (equating express will with "warning to keep off").

This *mens rea* standard has more recently been described as a requirement that the defendant "knew or should have known" he was entering against the owner's will. *See Ortberg v. United States*, 81 A.3d 303, 308 (2013); *see also* Barbara E. Bergman, *Criminal Jury Instructions for the District of Columbia* § 5.401 (Matthew Bender, Rev. Ed.) (to convict for unlawful entry the jury must find the defendant "knew or should have known that [he was] entering against the [owner's] will"). That is simply another way of expressing the same longstanding rule that the owner must explicitly or impliedly express his will to exclude. *Ortberg*, 81 A.3d at 308. If an owner has warned others to stay away, a defendant will or should know that his entry is unwanted. *See id.* at 305; *see also United States v. Montague*, 75 F. Supp. 2d 670, 671 (S.D. Tex. 1999)

(although unlawful entry laws "often do not contain an express mental state, the element of notice mean[s] that the defendant's entry must have been intentional"). Thus, long-ago-decided "cases make clear that the mental state with respect to acting against the will of the owner or lawful occupant [is] that the defendant knew or should have known that his entry was unwanted." *Ortberg*, 81 A.3d at 308; *accord* Pet. App. 23a-24a.

In requiring evidence of this wrongful state of mind, D.C.'s unlawful entry statute is archetypal. It is a "common requirement" of criminal trespass statutes that "the actor be aware of the fact that he is making an unwarranted intrusion." Wayne R. LaFave, 3 Subst. Crim. L. § 21.2 (2d ed. 2016) (citation omitted); *see also Martin*, 319 U.S. at 147–48 ("We know of no state which ... makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away."). This requirement is a defining feature of criminal trespass—as distinct from civil trespass, for which no mental state is often required. *See* LaFave, 3 Subst. Crim. L. § 21.2 & n.125. The purpose of this ubiquitous state-of-mind element is plain: It serves "to exclude from criminal liability both the inadvertent trespasser and the trespasser who believes that he has received an express or implied permission to enter or remain." Model Penal Code § 221.2, Comment at 88 (1980).

2. Petitioners attempt to muddy this rule in two ways, but neither succeeds.

First, they claim that *mens rea* is an affirmative defense to unlawful entry, not an element of the offense. That argument is both forfeited and wrong.

Petitioners' petition for certiorari did not dispute that *mens rea* is an element of the District's criminal trespass law, or that any reasonable officer would have so known at the time of the arrests. It argued only that the evidence known to the police supported the *mens rea* element. Pet. 11-16. Nor would this Court have granted review on such questions, since the D.C. Circuit is entitled to deference on its interpretation of local law. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998). The Court should thus decline to consider Petitioners' newly minted argument. *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

In any event, Petitioners' argument is meritless. The unlawful entry statute specifically provides that the crime is committed only when someone enters "against the will" of the person in charge. D.C. Code § 22-3302 (2007). And as discussed above, this means that the owner must *express* his will, such that the trespasser knows or should know the owner's will. The D.C. Court of Appeals has specifically held that its *prior* "cases make clear" that this state-of-mind requirement is an element of unlawful entry. *Ortberg*, 81 A.3d at 308 (citing, *e.g.*, *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989); *Smith*, 21 A.2d at 440); *accord* Pet. App. 11a, 23a-24a. It has thus long been established that *mens rea* is an element of the crime that is necessary for its commission, not simply an affirmative defense—as even the Government agrees. Br. of United States 15.

To be sure, courts have often noted that having a bona fide belief in one's right to enter is a "defense" to unlawful entry. But a bona fide belief in a right of entry is simply one way of showing that a defendant lacks knowledge or reason to know of the owner's will. Someone who possesses a bona fide belief of his right to enter, just like someone who enters "unmarked or ambiguously marked premises," lacks knowledge or reason to know he is present against the owner's will. *Jackson*, 357 A.2d at 411; *Smith*, 271 A.2d at 439. The defense therefore precludes *proof* of the *mens rea* element; it does not supplant the *mens rea* requirement. Rather than cast doubt on the existence of a *mens rea* element in the unlawful entry statute, the bona fide belief defense is confirmation that such an element exists.

Moreover, this Court has clearly distinguished between a defense that *negates an element*, and an affirmative defense that simply *excuses* otherwise criminal conduct. *See Smith v. United States*, 568 U.S. 106, 110 (2013); *Dixon v. United States*, 548 U.S. 1, 7 (2006). Although a defendant may be required to bear a burden of production to raise both kinds of defenses, the prosecution must disprove beyond a reasonable doubt a defense that negates an element, whereas a defendant may be required to prove a defense that merely excuses conduct. *Smith*, 568 U.S. at 110; *compare Dixon*, 548 U.S. at 11 (prosecution is required to disprove insanity beyond a reasonable doubt because "evidence that tended to prove insanity also tended to disprove [*mens rea*] element of the offense charged"), *and id.* at 7 (defendant can be required to prove duress because it "does not negate a defendant's criminal state of mind when the

applicable offense requires a defendant to have acted knowingly or willfully"). This distinction arises because "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

Here, it is clear that the bona fide belief defense is a true defense to the elements of the crime, not an affirmative defense that excuses conduct. For one thing, although the defendant bears the burden to raise the defense, the prosecution must disprove it beyond a reasonable doubt. *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993). And if that were not enough, the D.C. Court of Appeals has specifically explained: "[T]he existence of a reasonable. good faith belief is a valid defense precisely because it *precludes the government from proving what it must*—that a defendant knew or should have known that his entry was against the will of the lawful occupant." *Ortberg*, 81 A.3d at 309 (emphasis added); *see also* Pet. App. 11a ("[T]he cases interpreting the unlawful-entry statute are clear and consistent that [the *bona fide* belief] defense is available precisely because a person with a good purpose and bona fide belief of her right to enter lacks the element of criminal intent required by the statute."); *Phillips*, 524 U.S. at 167 (deference to court of appeals on local law). Again, the bona fide belief defense merely reaffirms that *mens rea* is an element of unlawful entry.

This has long been the law. Although the D.C. Court of Appeals' "prior discussions of mental state have lacked some precision," the court recently "look[ed] to [its] precedent to determine" that

knowledge (or reason to know) of the owner's will was an element of the offense—and not simply an affirmative defense. *Ortberg*, 81 A.3d at 307; *accord* Pet. App. 23a-24a. As that court has put it time and again, a person who "enters a place with a good purpose and with a bona fide belief of his right to enter . . . lacks the *element* of criminal intent required" by the unlawful entry statute. *Smith*, 281 A.2d at 439 (emphasis added); *accord* Pet. App. 11a; *see also* Br. of United States 15 n.4 (noting that the requirement that a person "knew or should have known that s/he was entering against [the owner's] will" reflects "decades of case law").

Second, Petitioners claim that, even if an owner's expression of his will is an element of unlawful entry in other contexts, there is an exception to this rule in the context of private dwellings. Br. 37. Not so. D.C. courts have uniformly held that the expressed will requirement also applies to private dwellings. *See, e.g.*, *Artisst*, 554 A.2d at 329; *Bean*, 709 A.2d at 86; *Culp*, 486 A.2d at 1176-77.

The case on which Petitioners rely for the contrary argument, *McGloin*, is no exception. In that case, the arrestee was seen in two "obviously private or restricted" areas of a private apartment building (the roof and fire escape). *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). In such circumstances, the D.C. Court of Appeals held that the express will requirement was satisfied. Despite the arrestee's purported explanation for his presence, it was "plain" that he knew or should have known he was unwelcome. Far from demonstrating that there is no *mens rea* element, this case makes clear that there is one—it simply had been satisfied.

3. Finally, Petitioners claim that the arrest was supported by probable cause—which *a fortiori* entitles them to qualified immunity—because even if they made a mistake of law, their mistake was reasonable. That is incorrect and does not alter the qualified immunity analysis.

Petitioners claim that, at the time of the arrests in this case, they incorrectly believed that unlawful entry had no *mens rea* requirement. Pet. App. 51a, 56a-57a. Relying on this Court's decision in *Heien v. North Carolina*, 135 S. Ct. 530 (2014), they contend that a reasonable officer would have made the same legal mistake, and thus their failure to find evidence of *mens rea* does not negate probable cause.

In *Heien*, this Court recognized that reasonable suspicion, under the Fourth Amendment, can rest on a mistake of law. But "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." *Id.* at 539. The officer's mistake in *Heien* was reasonable because the statutory provision he mistakenly interpreted was genuinely ambiguous and had never been previously construed by the State's appellate courts. *Id.* at 540.

In contrast, the contours of the unlawful entry statute are "clearly identified in words of common understanding, with little room for misinterpretation or conjecture." *Leiss*, 364 A.2d at 806. In the face of fifty years of uniform precedent, it was unreasonable at the time of the arrests for an officer to believe that the accused's mental state was not an element of unlawful entry. Because an "officer can gain no Fourth Amendment advantage through a sloppy

study of the laws he is duty-bound to enforce," *Heien* is of no use to Petitioners here. 135 S. Ct. at 539-40.

C. Under This Clearly Established Law, a Reasonable Officer Would Have Known That There Was No Probable Cause To Arrest Respondents.

It should also have been clear to Petitioners that, in the circumstances here, they lacked probable cause to arrest Respondents. In contending otherwise, Petitioners never acknowledge the applicable standard on review of *their* motion for summary judgment—namely, that the facts are viewed in the light most favorable to Respondents. On this view of the record, there was no evidence—circumstantial or direct—that Respondents knew or should have known they were present against the owner's will.

The officers had affirmative unrebutted and corroborated evidence of Respondents' innocent mental state. Respondents told the police that they were at the house on the invitation of the party's host, Peaches, or her guests, and Peaches confirmed that representation. But even setting aside that exculpatory evidence, Petitioners still lacked grounds to arrest. Probable cause requires affirmative evidence of guilt, not simply the absence of evidence of innocence, and there was no evidence of guilt here. Petitioners knew only that Respondents were at a house party, engaging in common (albeit debauched) party activities, in a cheaply furnished home in a poor neighborhood, and that they neither owned nor rented the house themselves. While this may be evidence of poor taste or poverty, or both, it is not evidence of knowing trespass.

1. In Evaluating Qualified Immunity, All Facts Must Be Viewed in Respondents' Favor.

On review of Petitioners' motion for summary judgment, all factual disputes must be resolved and all favorable inferences must be drawn in favor of Respondents. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam). Properly construed, the record here establishes the following: In the early morning hours, the police arrived at a house to find a party in progress, with guests drinking and women apparently engaged in exotic dancing for money (a lawful activity). J.A. 37, 96-97, 112, 115. The house was furnished, though sparingly. Some of the guests told the police that the host of the party, Peaches, had invited them. J.A. 53, 97, 131, 135, 165. Although Peaches had just left to go to the store, the officers spoke to her by phone and she confirmed that she had invited Respondents to her party. J.A. 53-54, 165. The landlord of the house was not at the party, and the guests did not know the landlord's name. J.A. 53, 67.

Both Petitioners and the Government entirely ignore the applicable standard in their qualified immunity analysis, however. *See* Br. 42-50; Br. of United States 22-32. In recounting the facts, they repeatedly rely on incredible or contradicted evidence, seeking to cast the evidence in the light most favorable to them at every turn. But there are a number of genuine, material disputes of fact relevant to the qualified immunity inquiry. Indeed, Respondents have compelling bases to question the credibility and accuracy of the investigating officers'

assertions regarding what they perceived and did at the house, as well as before they arrived. In reviewing the denial of qualified immunity to Petitioners, the Court must disregard this dubious evidence.

First, Petitioners claim someone received a tip about the house. J.A. 112. That evidence should be disregarded on Petitioners' motion, however, because there are multiple reasons to doubt the tip was ever given or received. The only evidence about the tip comes from people without personal knowledge of it. *E.g.*, J.A. 94, 98-99, 112, 131. No one described personally receiving the tip, nor the circumstances in which the tip was received. And no documentary evidence corroborates that the tip was ever given. There is no transcript of a call to the police, no letter from a concerned citizen, no police report contemporaneously documenting the tip by the person who supposedly received it. [4] While Respondents cannot offer affirmative evidence disproving the tip—because evidence as to the tip is necessarily in the possession of Petitioners alone—they have identified a number of reasons that they should be permitted to cross-examine Petitioners about the tip at trial. There is thus a genuine dispute about whether the alleged tip was ever actually given to the police. *See, e.g.*, *Thomas v.*

---

[4] Instead, the record contains a declaration from someone named Randy Keck and an undated police report concerning someone named Walters. C.A. App. 85, 132. These documents, which allege neither "illegal activities" and loud noise, nor that the house was vacant at the time of the arrests, provide no evidentiary support for the alleged tip. *Id.*

Great Atl. & Pac. Tea Co., 233 F.3d 326, 331-32 (5th Cir. 2000); *S.E.C. v. Koracorp. Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978).

Second, Petitioners say Respondents fled when police arrived at the house. But the only officer who testified that Respondents "scatter[ed]" when police entered the house (Espinosa) also admitted that he was one of the last officers to enter the house, and that the partiers voluntarily opened the door when police knocked. J.A. 143. Moreover, another officer testified that he did not see anyone scatter when he entered, J.A. 85, and a third testified that everyone was sitting in the living room when he arrived, J.A. 51-52. Another officer asserted that someone was found hiding in a closet, J.A. 177, but not a single other officer corroborated that account, and one of the partiers contradicted it, J.A. 48-50. There is therefore a genuine dispute as to whether anyone fled or hid from the police.

Third, Petitioners contend that Respondents were smoking marijuana in the house. But the police never recovered marijuana in the house—despite looking all over for it. J.A. 81, 97. There is a genuine dispute, therefore, as to both the credibility of individual officers' testimony that they smelled marijuana and the accuracy of any such impressions.

Fourth, Petitioners claim that, despite first asserting that she had permission to be in the house, Peaches ultimately admitted that she did not. But Peaches supposedly admitted this lie to only a single officer, Detective Sepulveda. J.A. 53-54. Another officer, Sergeant Andre Suber, said he spoke to Peaches a number of times, and during their

conversations Peaches asserted that she did have permission to be in the house. *Id.* A third officer, Parker, attested to a conversation with Peaches that was similar to Suber's. J.A. 100, 165-66. Peaches also supposedly gave the police the landlord's phone number. J.A. 105. It would make little sense for Peaches to suddenly change course and admit—to a single person—that her entire story was a lie; if she felt cornered, she could have simply stopped answering the police's calls. In addition, the police did not memorialize *any* of their supposed conversations with Peaches. Sergeant Suber put nothing in writing about the exchanges, J.A. 55, and the police report about the night's event is conspicuously silent about all communications with Peaches, J.A. 112. There is thus a genuine, material dispute about the credibility of Sepulveda's story about his call with Peaches.

Finally, Petitioners assert that the landlord, Hughes, told an officer that Peaches and Respondents did not have his permission to be in the house. But only one officer, Parker, reported talking to Hughes, J.A. 99-100, 165-66, and Parker's credibility is sharply disputed. Indeed, the arrest report states that Parker recovered narcotics from the house—suggesting that Parker reported the same to his colleagues. J.A. 112. But Parker admitted that this was false; no drugs were found. J.A. 97; *see also* J.A. 81. Parker also testified that there was "no furniture in the house," J.A. 97, despite the unrebutted evidence of furniture throughout the house, *e.g.*, J.A. 41. Moreover, the police report about the evening lacks any mention of Parker's supposed conversation with Hughes, even though the report

includes much detail about other events. J.A. 112. There is a significant and genuine dispute, therefore, whether Parker ever had such a conversation with Hughes.

On Petitioners' motion for summary judgment, all of these factual disputes must be resolved in favor of Respondents. *Tolan*, 134 S. Ct. at 1866. And without these disputed facts, Petitioners plainly lacked probable cause to arrest.

2. The Police Had Affirmative Evidence of Respondents' Innocent Mental State.

The police lacked probable cause that Respondents committed unlawful entry because they had affirmative evidence of Respondents' innocent mental state and no evidence refuting it. Respondents made unrebutted, corroborated statements indicating a lawful state of mind, and these statements negate any probable cause the police might have otherwise had.

Respondents' statements were affirmative evidence of innocence. They "admitted that they were social guests" at the house, J.A. 105, and then explained that the host of the party, Peaches, had invited them to the house. J.A. 36, 53, 97, 131, 135, 165. Peaches independently confirmed the same. J.A. 53. There was no evidence suggesting that Respondents' statements might not have been true; indeed, Petitioners did not question their veracity at any other stage of this case. Because all of the evidence before the police showed that the host of the party had invited Respondents to the house, and because this evidence was not only unrebutted but

corroborated, the police lacked evidence that Respondents knew or should have known they were in fact unwelcome.

Petitioners claim that the police can categorically discredit suspects' statements, and thus that the police could disregard what Respondents and Peaches told them. That is incorrect. The probable cause analysis asks how a "reasonable" or "prudent" officer would view the evidence before him. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); *Adams v. Williams*, 407 U.S. 143, 148 (1972); *Carroll v. United States*, 267 U.S. 132, 162 (1925). And that depends on the quality of the particular evidence before him—not on categorical rules.

For example, a prudent officer could certainly discredit a suspect's assertion that he didn't "know how the loaded gun got under [his] seat." Pet. App. 126a. The officer could take note of the strong circumstantial evidence to the contrary: The gun was under the suspect's own seat, and it is unlikely he would be unaware of something in such proximity to him and under his control. Faced with that factual tension, the officer could reasonably doubt the veracity of the suspect's self-serving statement and therefore discredit it.

Similarly, an officer could reasonably discredit a parent's assertion that she "didn't realize the under-aged high schools kids in [her] basement had a keg." *Id.* The officer could consider the evidence that she did know: The kids were in her basement, and they had to get an entire keg (which they were too young to buy themselves) down there. An officer reasonably might disbelieve the parent's statement.

Here, in contrast, there was no reason for the police to discredit the partygoers' statements. There was nothing about where they were, what they were doing, or the content of their statements that suggested they were lying. Respondents were indeed at a party that someone was hosting; someone had let them into the house (the front door was intact); and Peaches confirmed that it was she who invited them.

In such circumstances, where there is no reasonable basis for discrediting Respondents' statements, the police must take them into account. *See Guzell v. Hiller*, 223 F.3d 518, 520 (7th Cir. 2000) ("[p]olice must act reasonably on the basis of what they know," and "if what they know" includes information that calls into question probable cause, "they can't close their eyes to th[at] additional information"); *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000) (officers cannot look only at evidence of guilt and ignore claim of innocence). And taking Respondents' statements into account, there was no basis for the police to conclude that Respondents knew or should have known that they were in the house against the owner's will.

3. The Police Had No Evidence That Respondents Had a Guilty Mental State.

Even if police officers could categorically discredit a suspect's statement, Petitioners' motion for summary judgment was nonetheless correctly denied. Probable cause requires affirmative evidence that someone has committed a crime. Thus, here, probable cause requires the *presence* of evidence that Respondents *had* knowledge that they were in the house against

the owner's will. That is different from the *absence* of evidence showing Respondents *lacked* knowledge. In other words, the police must identify inculpatory evidence of some kind; they cannot rely exclusively on rejection of Respondents' exculpatory evidence.

Accordingly, even if Petitioners could properly discredit Respondents' assertions of innocence, all this means is that Petitioners could disregard those statements in the probable cause analysis. The probable cause inquiry simply becomes: Setting aside Respondents' statements to the police, did the officers have affirmative evidence from which to conclude that they knew or should have known they were unwelcome? Or said another way, imagining that the police had arrested Respondents without ever talking to them, did the police have evidence to establish the knowledge element?

The answer is clearly no. When police happen upon a house party, they may not assume that the guests showed up uninvited and then arrest them for unlawful entry—absent affirmative evidence of guilt. This remains the case when not all the guests were invited directly by the host. It remains the case when the host's landlord is not invited to the party, and when the guests do not know the landlord's name. And this remains the case when the guests are drinking and dancing with strippers. Without affirmative evidence suggestive of unlawful entry, the police lack probable cause to arrest.

Here, Petitioners had no such evidence. None of the evidence on which they rely shows that Respondents knew or should have known they were at the party against the landlord's will.

a. Petitioners point to a number of "clear signs" that supposedly put Respondents on notice that they were trespassing: There were many guests, the party was late at night, there were "illicit activities," and some guests said they were invited by other guests. But those facts have nothing to do with trespassing. They are standard features of typical house parties—at least in some communities. These "signs" in no way suggest that Respondents knew (or should have known) their entry was unauthorized.

House parties are common in communities across the country—from college campuses to homes in the District of Columbia. *E.g.*, Benjamin Freed, *DC Sues Owner of Airbnb House Often Used for Parties*, Washingtonian, May 8, 2015, *available at* http://goo.gl/aDbYH1; 30 & Over House Party & Cookout Crew, http://goo.gl/VFYjwj; Washington, DC House Party Events, Eventbrite, http://goo.gl/Uuto2A; Erica Avesian, *A Freshman Girl's Guide to Frat Parties*, http://goo.gl/xc4VWd. These parties are often big. They may be raucous and last until late. They often involve alcohol, and sometimes even strippers. *E.g.*, Eric Levenson & Arit John, *How the Kids Do It Now: Partying*, The Atlantic, Apr. 9, 2014, *available at* http://goo.gl/2DmB7w; *Strippers Said to Be Commonplace At Football-Recruit Parties*, Fox News, Feb. 10, 2004, *available at* http://goo.gl/eYmuX5. Frequently, invitees extend the invitation to their friends, who extend the invitation to their friends. David Brunow, et al., Throwing a House Party 3, *available at* http://goo.gl/VKa66u ("Using a list is not usually an option at a typical house party, in which friends tell friends ....").

But typically, guests at house parties are in fact authorized to be there. The host invites her friends, and then implicitly or explicitly gives invitees permission to extend the invitation further. *E.g.*, How to Throw an Amazing College Party, WikiHow, http://goo.gl/Gp8djD ("If you are hoping to have lots of people at your party, then you might consider telling all of your friends to bring someone along."); How to Get Invited to a Party, WikiHow, http://goo.gl/3FboMQ ("In most cases it is generally accepted for invited guests to bring a 'plus one' to a big to-do."); Debby Mayne, *How to Host an Open House Party*, The Spruce, Jan. 30, 2017, http://goo.gl/CFTB5c ("It's also a good idea to expect more people than you invited to show up.").

The same is true here. There were many people at the party. It was debauched and went until late. There was alcohol, and there were strippers. The host invited some of the guests, who in turn invited others. These facts do not distinguish the house party here from any other. There was thus no basis to assume that, unlike other house parties, the guests here were unwelcome.

Moreover, even if Respondents' conduct was not typical house party behavior, it is certainly not suggestive of knowing trespass. There is no basis to conclude, for example, that trespassers are more likely to attend parties involving strippers than non-trespassers, or that they are more likely to drink alcohol, or that they are more likely to party late. These "illicit activities" take place all the time, including in private homes. *E.g.*, National Institute of Health, Alcohol Facts and Statistics, *available at* http://goo.gl/VUQqy1 ("According to [a 2015 survey],

86.4% of people ages 18 or older reported that they drank alcohol at some point in their lifetime; 70.1% reported that they drank in the past year; 56.0% reported that they drank in the past month."); Stripper, Wikipedia, http://goo.gl/8yQigV ("Private parties are popular events for which to hire strippers."). However bawdy Respondents' conduct may have been, it is a *non sequitur* to conclude that this behavior made it more likely that they knew or had reason to know they were present against the owner's will.

b. Petitioners also contend that they could infer Respondents' guilty state of mind because neither Peaches nor the owner of the house was present when police arrived. Br. 18. Not so. As for Peaches, she explained to the police that she had left the house to go to the store just before they arrived. J.A. 165. Nothing about that is suspicious. And as for the landlord, there was no reason that the partiers would expect him to be at the party. Landlords of rental homes often live offsite. So for parties in rental homes (just as for parties in college dormitories), no guest would be surprised if the "owner" were neither the host nor an invitee.

Nor is it suspicious, as Petitioners and the Government contend, that the party guests did not know who the "owner" of the home was. Guests at a party have no reason to inquire whether their host is an owner or a renter, and they certainly have no reason to inquire further about the name of a renter's landlord. It is the rare social guest who would demand to know the private details of her host's housing arrangements. Ignorance of those details is not evidence of trespass.

c. Petitioners and the Government further point to Respondents' allegedly "incomplete and inconsistent" responses to the police: Some partiers reported that Peaches had invited them to the party, and some reported that they had been invited by others. But as discussed above, guests at house parties are often explicitly or implicitly permitted to extend the invitation further, or to bring along a plus-one. *See supra* at 35-36. There is nothing inconsistent, incomplete, or even unusual about the partiers' representation that some guests were invited directly by the host and others received the invitation secondhand. *See, e.g.*, *Mitchell*, 841 F.3d at 75.

d. Petitioners also claim that the house was "vacant," and that the vacancy creates probable cause of Respondents' unlawful mental state. Although Petitioners never make clear what they mean by "vacant," their argument fails under any definition.

To the extent Petitioners mean that the house was empty, they are simply wrong in premise. As the evidence demonstrates, there were a number of chairs in the living room and there was a mattress in the bedroom. J.A. 41, 96. There were lights on, J.A. 52, candles put out, J.A. 96, and shades on the windows, C.A. App. 82. The electricity and plumbing were working normally. J.A. 45, 52.

To the extent that Petitioners instead mean that no one was living in the house, that is beside the point—though in fact the record suggests that Peaches was living there, J.A. 41. What matters for purposes of Respondents' state of mind is what was *apparent* (or should have been apparent) to them.

And what was apparent to Respondents is that the house was furnished, and secured with a lock and key, just like any other house. *Id.* Nothing about the house should have alerted Respondents that no one lived there; it was not boarded up, there was no for-sale sign out front, and there was no stay-out sign posted. *Cf. Culp*, 486 A.2d at 1176.

Apparently acknowledging as much, Petitioners also assert that the sparseness of the furnishings should have put Respondents on notice that their presence in the home was unwanted. But Petitioners simply overlook the reality of how many Americans, and many residents of the District of Columbia in particular, live.

The house in this case was located in the River Terrace neighborhood of the District, where the poverty rate around the time of the party was 29% and the unemployment rate was 10%—well above the rates across the District as a whole. Neighborhood Info DC, DC Zip Code Profile—Well-Being. http://goo.gl/AcRKT3. Under-furnished homes in poor communities like River Terrace are extraordinarily common. *See, e.g.*, Laura Klairmont, *Tackling Poverty in Nation's Capital, One Bed at a Time*, CNN, Apr. 21, 2015, http://goo.gl/nRhYdn (many apartments in the District have "nothing but a chair"; people "stor[e] their clothes in plastic garbage bags" and lack tables on which "to eat their meals"). Indeed, the median household expenditure on furnishings in River Terrace is only 69% of the national average. Consumer Spending in River Terrace, Point2Homes, http://goo.gl/MUqiQQ.

Compounding the problem are rising housing costs throughout the District, in part due to gentrification in other neighborhoods. As a result of "rising housing costs, stagnant or falling incomes, and a shortfall of federal housing assistance," "eviction has become commonplace in low income communities." Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, Fast Focus, Mar. 2015, *available at* http://goo.gl/trbrgf. This means that low-income households in the District move frequently, which in turn increases the costs and difficulties of settling into and furnishing a home. *See* Paul Duggan, *Study: D.C. Gentrification Can Cause Pockets of Poverty to Grow, Especially East of Anacostia River*, Wash. Post, Nov. 23, 2016, *available at* http://goo.gl/KHJHiY.

Thus, even if inexpensive furnishings might, in other communities, be sufficient to put partygoers on notice that the house was unoccupied, it was insufficient here. The partygoers would have been aware only that the party host, like many of her neighbors, had been unable or unwilling to invest significantly in furniture yet—possibly because she had just moved in or possibly because she was one of the unlucky 29% of residents living in poverty.

The case on which Petitioners rely, *Culp*, is thus inapposite. 486 A.2d 1174. In that case, which involved an empty *and* unoccupied home in disrepair, the appellant argued that, because the house appeared abandoned, he had no reason to think he had entered without the owner's consent. *Id.* at 1175. That is, he was using the home's vacancy to *excuse* his presence, not to *condemn* it. Anyway, the Court simply disagreed that the house appeared abandoned; the property revealed "indications of a continued

claim of possession by the owner or manager" (boarded-up windows), and thus the appellant should not have assumed the house was abandoned. *Id.* at 1177. Because, as discussed above, the house here appeared neither empty nor unoccupied, *Culp* says nothing about what Respondents knew or should have known.

The same is true of the unlawful-entry statute's provision about prima facie evidence: "The presence of a person in any private dwelling . . . that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered . . . shall be prima facie evidence that any person found has [committed unlawful entry]." D.C. Code § 22-3302(a)(1). Because the house here was not vacant, boarded up, or secured in any other way that suggested vacancy, this statutory provision plays no role here.

In short, none of the evidence properly considered on review of Petitioners' motion for summary judgment suggests that Respondents knew or had reason to know they were unwelcome at the home. Instead, it simply shows that they attended a typical, if licentious, house party in a low-income neighborhood. It should have been clear to a reasonable officer, therefore, that he lacked probable cause to arrest Respondents.[5]

---

[5] Even if Petitioners were entitled to qualified immunity with respect to the § 1983 claim, this does not necessarily imply they have a common-law privilege against Respondents' common-law claims. Unlike qualified immunity, immunity under the common law turns on a "subjective test," *i.e.*, whether "the officer had a reasonable good faith belief that his or her conduct

D. Petitioners Distort the Qualified Immunity Inquiry.

An officer cannot claim qualified immunity when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Petitioners are not entitled to qualified immunity because it would have been clear to any reasonable officer in their shoes that he could not arrest Respondents. That officer would have known that (1) probable cause requires at least some evidence on every element; (2) the District of Columbia crime of unlawful entry had a *mens rea* element; and (3) he lacked any evidence on that *mens rea* element. Petitioners, joined by the Government, resist this conclusion by distorting the qualified immunity inquiry in three ways.

First, Petitioners and the Government contend that qualified immunity is so broadly available that Petitioners may hide behind it unless Respondents can point to a specific case that prohibited an arrest under D.C. law on identical facts. That is, Petitioners claim that they are immune from suit unless there was a case establishing that "the

---

(continued...)

was lawful." *Liser v. Smith*, 254 F. Supp. 2d 89, 96 (D.D.C. 2003); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). To resolve the common-law privilege issue, therefore, the factfinder must first determine each officer's subjective belief at the time of the arrests; only then can the question whether each officer possessed a "reasonable good faith belief" be resolved. Absent affirmance, that is a question for remand.

circumstantial evidence *in this case* was insufficient" to support a finding of probable cause. Br. 44 (emphasis added); *see also* Br. of United States 25. This argument is foreclosed by this Court's prior express rejection of any requirement "that the facts of previous cases be 'materially similar' to [the present] situation." *Hope*, 536 U.S. at 739. Officials need only have "fair warning" that their conduct was unconstitutional. *Id.* at 741. They can thus be on notice their conduct violates established law "even in novel factual circumstances." *Id.* This Court has never required that there be an existing case identical in its minute particulars to the facts at issue.

Second, Petitioners and the Government argue that they are entitled to qualified immunity because "it was not clearly established that an on-scene officer had to accept a suspect's claim of an innocent mental state when reasonable grounds existed to doubt the claim's credibility." Br. 45; *see also* Br. of United States 29. As an initial matter, even if this argument were correct, it would not get Petitioners anywhere. The officers lacked a factual basis to arrest even if they reasonably could have disregarded Respondents' statements. *See supra* Part I.C.3.

In any event, this argument attacks a straw man. Of course police officers are permitted to doubt a suspect's explanation when those doubts fairly arise from their observations and the information available to them. *See Figueroa v. Mazza*, 825 F.3d 89, 102 (2d Cir. 2016). And when other evidence available to the officers supports a finding of probable cause, officers are entitled to arrest notwithstanding a claim of innocence. *See Finigan v. Marshall*, 574 F.3d 57, 60-

63 (2d Cir. 2009) (police officers had probable cause to arrest given that suspect had surreptitiously entered house, a report of burglary had been made, and owner had changed locks); *Wright v. City of Phila.*, 409 F.3d 595, 603 (3d Cir. 2005) (police entitled to disbelieve suspect who broke window to enter house when explanation was not credible). Respondents have never suggested otherwise.

Respondents' point is that, here, there were *no* grounds to doubt their credibility—all evidence in fact corroborated their statements—and thus the law was clear that there was no probable cause to arrest them. Indeed, it is well established that officers are not entitled to simply discredit an explanation that "so thoroughly and reliably accounted for the officers' earlier suspicions that it negated any reasonable belief that probable cause existed." *Figueroa*, 825 F.3d at 102. Put another way, officers are not entitled to qualified immunity when "the facts establishing [a] defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis" to arrest. *Garcia v. Does*, 779 F.3d 84, 93 (2d Cir. 2015). Any contrary rule would give police license to arrest citizens engaged in innocent conduct and then justify the arrest after the fact through the bare assertion that they found the suspect not to be credible.

Third, Petitioners and the Government make a similar error when, relying on a series of trespassing and similar cases, they assert that the law was at a minimum unclear as to whether police could arrest trespassers notwithstanding their innocent explanations. Br. 45-47; *see also* Br. of United States

26-27. In each of the cited cases, there was evidence that the trespassers knew or should have known they were present against the will of the owner, so their self-serving statements were properly discredited. Analogizing to those cases improperly assumes that here too there was evidence undermining Respondents' statements that they had been invited to the house by Peaches. And as discussed above, that is not the case.

To reiterate, Respondents *agree* that officers are not required to accept a suspect's self-serving explanation in the face of evidence that the suspect has entered a dwelling against the express or implied will of its owner. *See Kozlovska v. United States*, 30 A.3d 799, 803 (D.C. 2011) (suspect claimed to have permission to be in building but was the subject of order barring entry); *Artisst*, 554 A.2d at 327 (suspect's innocent explanation was cast in doubt by a prominently-posted warning requiring that identification be shown to security guard); *McGloin*, 232 A.3d at 90-91 (suspect's stated explanations for wandering on roof of building were contradictory and lacked any corroboration). And Respondents *agree* that, in other contexts as well, police may discredit a suspect's explanation when the circumstances permit an inference of wrongful intent. *See Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 96 (D.C. 1997) (officers arresting suspect for entering Metro station without paying could infer intent from her act of walking past the farecard machines into a restricted area); *Nichols v. Woodward & Lothrop, Inc.*, 322 A.2d 283, 285 n.2 (D.C. 1974) (arresting officer not required to accept explanation for taking and hiding sweater for which suspect did not pay); *Prieto v. May*

Dep't Stores Co., 216 A.2d 577, 578 (D.C. 1966) (shoplifter's explanation that she had "forgotten" that she had the stolen merchandise was uncorroborated).

But whether there was in fact any evidence warranting an inference of *mens rea* depends on the circumstances of the case, and in these circumstances there was none. In the absence of any conflicting evidence demonstrating that Respondents knew or should have known they were present against the will of the owner—*i.e.*, that they were explicitly or implicitly warned not to enter *before* their arrest—a reasonably prudent officer could not discredit Respondents' statements.[6]

E. Petitioners' Reliance on Their Superiors' Order Was Not Objectively Reasonable.

Finally, Petitioners Parker and Campanale claim they are entitled to qualified immunity because they acted at their superior's direction. That argument, however, fails for the same reasons as Petitioners' other arguments.

An officer may rely on another's determination of probable cause to make an arrest, but the officer's "reliance ... must be objectively reasonable for him to be clothed with qualified immunity." *Barham v.*

---

[6] Petitioners and their *amici* urge that reversal of the judgment below is necessary to avoid a rule that will unduly constrain law enforcement agents. *See* Br. 35-36; Br. of United States 21-22, 31-32: Br. of Utah et al. 12-14; Br. of Nat'l Ass'n of Counties et al. 4-17. But in light of the parties' agreement that officers may disregard a suspect's claim of innocence where the facts and circumstances support doing so, this claim is overblown. Again, at bottom, this case simply entails a dispute over what inferences are permissible on one particular set of facts.

Salazar, 556 F.3d 844, 850 (D.C. Cir. 2009) (Henderson, J., concurring). Campanale and Parker cannot show it was objectively reasonable to rely on their superior's arrest order because they should have known there was insufficient cause to arrest. They were involved in the investigation at the house, they observed the relevant facts, and they learned firsthand that Peaches had invited Respondents to the house. Pet. App. 78a-79a. Qualified immunity is therefore unavailable.

II. RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON PROBABLE CAUSE WAS CORRECTLY GRANTED.

For the reasons discussed above, Petitioners lacked probable cause to arrest Respondents unless they had at least some evidence that Respondents knew or should have known they were present in the house against the will of the owner. *See supra* Part I. Petitioners had no such evidence.

Even when the record is viewed in the light most favorable to Petitioners, as is appropriate on review of Respondents' summary judgment motion, there was no evidence that Respondents knew or should have known they were present against the owner's will. In this posture, the Court may properly take as true some additional evidence: Several officers said an unidentified person received a tip that there were illegal activities and loud noise in the house, and that it was vacant, J.A. 94, 112; one officer said he saw some partiers scatter when the police arrived at the house, J.A. 143, and another officer said he found someone hiding in a closet, J.A. 177; some officers said they smelled marijuana in the house, J.A. 97,

131; one officer (Sepulveda) stated that Peaches admitted she had lied when she said she had permission to be in the house, J.A. 54; and one other officer (Parker) stated that he had spoken to Hughes, who had told him that, because his lease negotiations with Peaches stalled, Peaches lacked permission to be in the house or invite others in, J.A. 99-100, 166. None of this evidence moves the needle on probable cause, however. Accordingly, Respondents' motion for summary judgment on liability was properly granted.

A. Parker's Conversation With Hughes Is Not Probative.

Petitioners argue that Parker's alleged conversation with Hughes alone proves that Respondents knew or should have known they were present against the owner's will. According to Petitioners, the conversation permitted police to conclude that Respondents lacked permission to be in the home, and police may infer a culpable mental state *whenever* someone enters a private home without the permission of the owner. Such a categorical rule is unsupported by precedent, and it is wrong. In these circumstances, Parker's report of his conversation with Hughes is in no way probative of Respondents' state of mind.

1. This Court should reject the ill-fitting categorical rule Petitioners propose. As Petitioners themselves point out, bright-line rules are inappropriate in the probable cause context. Br. 15 ("The Court consistently rejects . . . 'rigid rules, bright-line tests, and mechanistic inquiries . . . .'" (quoting *Harris*, 568 U.S. at 244)). The inferences an officer may reasonably draw about a suspect depend

on the particular circumstances he confronts, and thus probable cause is necessarily a fact-sensitive inquiry. *Henry*, 361 U.S. at 102.

That is no less true here. No doubt, there are many circumstances in which the police may appropriately arrest someone who is in a private house without the consent of the owner. Say, for example, the police respond to a house alarm to find a man with a crowbar, his pockets laden with jewelry, and the owner declares the man a thief. The police plainly have cause to arrest. But that is not so in other cases. Suppose a couple has a fight and both spouses tell police that the other is there without permission. Or suppose an owner reports to the police that a young child, or an old woman with apparent dementia, wandered through his open door. It would not be reasonable for the police to arrest every one of these people for knowing trespass, at least without further investigation.

Petitioners' proposed rule is even more inappropriate in a landlord-tenant context, where the "owner" is not the one who lives in the home, as here. Social guests may not know—and should not be expected to know—the details of their hosts' leasing arrangements. Has the host overstayed her lease? Has she fallen behind on the rent? Is the lease actually in someone else's name? In each of these cases, the "owner" might report that the host—and by extension, the host's guests—lacks permission to be in the home. But the guests would have no idea this was the case, and no reason to think it might be.

Petitioners' cases only prove the point: In certain cases, the evidence available to the police may create

probable cause (or even proof beyond a reasonable doubt) of a crime. *E.g.*, Br. 18 (citing *United States v. Mousli*, 511 F.3d 7 (1st Cir. 2007) (evidence that counterfeit currency was found next to defendant's printer, that one bill was incomplete, and that there were a significant quantity and variety of bills was legally sufficient to prove counterfeiting)). But in other cases it may not. *Id.* (citing *United States v. Aguilar*, 515 U.S. 593 (1995) (evidence that defendant lied to investigating agent was insufficient to prove he intended to obstruct a judicial proceeding)). The upshot is that the inferences that reasonably may be drawn depend on the particulars.

2. Here, the particulars do not show that Respondents had an unlawful state of mind. As it turned out, although their party host had begun lease negotiations with the landlord, those negotiations had gone sour. J.A. 99. But Respondents had no reason to know that. Social guests, like Respondents, do not generally inspect their host's lease before setting foot inside a rental unit. Nor should they be expected to. Attending a party cannot give rise to criminal liability whenever the host overstays her lease or fails to pay the rent on time. The fact that Respondents' host turned out not to have reached a valid rental arrangement with her landlord thus does not provide a basis to infer that every partygoer knew or should have known that.

B. The Alleged Tip Is Not Probative.

The evidence about the supposed tip the police received does not advance the ball either. The tipster allegedly reported "illegal activities" going on inside the house. J.A. 112. But such vague and generalized

assertions of unlawful conduct are "practically meaningless" in the probable cause inquiry. *Henry*, 361 U.S. at 103; *accord Beck v. Ohio*, 379 U.S. 89, 94 (1964) (an officer's testimony "that he had 'information,' that he had 'heard reports,' [and] that 'someone specifically did relate that information'" did not support a finding of probable cause to arrest); *Recznik v. City of Lorain*, 393 U.S. 166, 169–70 (1968) (probable cause to arrest requires more than "the mere fact of an assertion by an informer").

Moreover, the tip was shown to be wrong. To have any weight in the probable cause inquiry, the informant's statement must be particularized *and* bear some indicia of reliability or corroboration to support probable cause. *See, e.g.*, *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984) (per curiam). Yet the officers found no evidence of "unlawful activities" in the house. J.A. 67, 86, 98. The tip thus did nothing to establish probable cause of any crime generally, let alone unlawful entry specifically. *E.g.*, *Whiteley*, 401 U.S. at 567; *Jurkowitsch v. Choudhury*, 673 F. App'x 44, 46–47 (2d Cir. 2016) (no probable cause for unlawful entry where officer's observations contradict, rather than confirm, informant's statements).

The tipster also supposedly told the police that there was loud noise coming from the house and that the house was vacant. J.A. 94, 112. But talking or playing music loudly is neither illegal itself nor evidence of another crime, and as soon as the police arrived they could see the house was not vacant, *see supra* at 38-41. Again, the tip does nothing to help Petitioners establish probable cause.

C. Respondents' Alleged Flight Is Not Probative.

Petitioners and the Government contend that Respondents' alleged flight when the police arrived at the house is probative of their knowledge, because it supposedly revealed Respondents' "consciousness of guilt." Not so under these circumstances. "[D]eliberatively furtive actions and flight at the approach of . . . law officers" can, when "coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime," be considered in the decision to make an arrest. *Sibron v. New York*, 392 U.S. 40, 66-67 (1968). But even headlong flight "is not sufficient standing alone" to create reasonable suspicion, let alone probable cause. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). And flight is nothing more than "ambiguous" when there is an explanation for the suspect's actions. *Wong Sun*, 371 U.S. at 482.

African-Americans, like Respondents, are often distrustful of the police. *See, e.g.*, Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, Pew Research Center, Sept. 29, 2016, http://goo.gl/GNnLYr. The police are significantly more likely to use force against African-Americans, even when racial disparities in crime rates are taken into account. *See, e.g.*, Timothy Williams, *Study Supports Suspicion That Police Are More Likely to Use Force on Blacks*, N.Y. Times, July 7, 2016, at A16, *available at* http://goo.gl/XvYNrN. In the District of Columbia, African-Americans are 50% more likely to file complaints against the police. Theresa Vargas & Kimbriell Kelly, *"It Made Me Hate the Police": Ugly Encounters with Officers Fuel Loss of Trust, Costly*

Payouts, Wash. Post, Jan. 8, 2017, at C05 *available at* http://goo.gl/4fbM6S. And their complaints are often meritorious; in the years since 2005, the District has paid at least $31.6 million in damages in 173 cases alleging police misconduct, false arrest, and excessive use of force. *Id.* This disparate treatment of African-Americans means that their flight is often "totally unrelated to consciousness of guilt." *Commonwealth v. Warren*, 58 N.E. 3d 333, 342 (Mass. 2016); *see also id.* ("[T]he finding that black males . . . are disproportionately and repeatedly targeted . . . suggests [flight] might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.").

The particular circumstances here would have exacerbated any fear that Respondents felt. The police arrived at the house in droves in the middle of the night. J.A. 133, 155; C.A. App. 65. After knocking "heavily" on the door, C.A. App. 65, they raided the house with their guns drawn, J.A. 47-48, 50. It is thus entirely unsurprising that some of the partygoers would respond fearfully. The police should have expected as much, and could not reasonably have concluded that the partygoers' fear indicated that they knew they were trespassing.

Moreover, not everyone responded the same way to the police. Many of the partygoers remained where they were; one let the police in. J.A. 143. Even if the alleged flight of a handful of individuals gave the police a reason to believe those people knew they were present without the consent of the owner, that hardly gave Petitioners the requisite "suspicion that the *particular* individual[s]" who behaved otherwise

were guilty of a crime. *United States v. Cortez*, 449 U.S. 411, 418 (1981) (emphasis added); *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

D. Respondents' Alleged Marijuana Use Is Not Probative.

Petitioners' evidence that officers smelled marijuana in the house is similarly irrelevant to Respondents' state of mind. Marijuana use is extraordinarily common in this country, and in the District of Columbia specifically. Indeed, "[t]here are almost as many marijuana users as there are cigarette smokers in the U.S." Christopher Ingraham, *11 Charts That Show Marijuana Has Truly Gone Mainstream*, Wash. Post, Apr. 19, 2017, http://goo.gl/1hQaKw. In the District of Columbia, more than half the city's residents have tried marijuana, and more than 17% currently use it. Government of District of Columbia, Marijuana in the District of Columbia 6, *available at* http://goo.gl/K9ZB7H. Moreover, there is no empirical basis to conclude that marijuana use is correlated with unlawful entry, and there is no logical reason to believe it might be. Petitioners cannot construct probable cause for unlawful entry with evidence that the house smelled of marijuana.

E. Peaches' Alleged Admission Is Not Probative.

Detective Sepulveda's testimony that Peaches supposedly admitted to police that she lacked permission to be in the house is not probative of Respondents' knowledge either. There is no evidence that Peaches made the same admission to Respondents. And the fact that police were

supposedly able to extract information from Peaches after repeated questioning does not suggest that Respondents obtained the same information. Guests at a house party do not typically interrogate their host about her leasing arrangements.

Nonetheless, Petitioners now claim, for the first time in this litigation, that because Peaches reportedly lied to the police about whether she had permission to be in the house, Respondents' statements about her invitation are somehow affirmative proof of their guilty state of mind. As an initial matter, Petitioners failed to raise this dubious argument in any lower court or in their petition for certiorari. The argument thus comes too late, and the Court should not consider it. *Ortiz*, 422 U.S. at 898.

In any event, Petitioners' newfound argument fails on the merits. Petitioners' contention is that Peaches knew she lacked permission to be in the house, and Peaches was involved in a common enterprise with Respondents. Accordingly, they conclude, under this Court's opinion in *Pringle*, the police could impute Peaches' knowledge to Respondents. *Maryland v. Pringle*, 540 U.S. 366 (2003).

Petitioners misunderstand the import of *Pringle*. In that case, this Court held that the police could reasonably conclude that three men who were traveling together in a car full of cocaine and cash were involved in a common enterprise. *Id.* at 371-72. Given the circumstances (everyone was in the same small car in close proximity to the drugs, yet all denied knowledge of the drugs), the police could reasonably infer that "*any* . . . of the occupants had

knowledge of, and exercised dominion and control over, the cocaine." *Id.* at 372 (emphasis added). And, by extension, the police could also properly conclude that the three men *together* had knowledge and control of the cocaine—that is, that they were part of a common enterprise. *Id.*

Not so here. Unlike the three men in *Pringle*, Peaches and Respondents were not similarly situated. So even if the police had reason to think Peaches had committed a crime, they had no reason to think the same of Respondents. Unlike Peaches, Respondents never claimed to be the host of the party or the renter of the house, and they never backtracked from any of their statements. And unlike Peaches, they never admitted that they knew they were not allowed in. Under these circumstances, there is no basis to conclude that every *individual* was guilty of unlawful trespass. And thus there is no reason to conclude that everyone *together* was guilty of committing unlawful trespass either. Because there was no evidence of a common enterprise, Petitioners cannot use *Pringle* to avoid making an individualized probable cause showing for Respondents. *See Ybarra*, 444 U.S. at 91 ("[A] search or seizure of a person must be supported by probable cause particularized with respect to that person."). Thus even if Peaches' admission is evidence of her unlawful entry, it is probative of nothing as to Respondents.

In short, even viewing the facts in favor of Petitioners, the evidence shows only that Respondents attended a raucous house party, and engaged in raucous house-party activities, at the invitation of someone whose lease negotiations had stalled. That is not a basis to arrest for trespass.

Respondents' motion for summary judgment was therefore properly granted.[7]

* * *

Even if Respondents were not entitled to summary judgment, Petitioners surely are not either. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 129 (2001) (Breyer, J., concurring) ("To deny one party's motion for summary judgment . . . is not to grant summary judgment for the other side."). Yet Petitioners seek reversal not only of the lower court's grant of *Respondents'* motion for summary judgment but also of the denial of *their own* cross-motion. That is plainly improper in light of the factual record. If this Court does not affirm, it should remand for trial.

As already explained, there are a number of genuine, material disputes of fact that go to the existence of probable cause. *See supra* Part I.C.1. On Petitioners' motion for summary judgment on probable cause, all of these factual disputes must be resolved in favor of Respondents. *Tolan*, 134 S. Ct. at 1866. And without these disputed facts, the basis for

---

[7] Petitioners and the Government allege one additional basis for probable cause: Some partygoers said they were attending a bachelor party, whereas others said they were attending a birthday party. Br. 4 n.2; Br. of United States 3. But the only evidence on this point was Officer Campanale's testimony during the trial on damages—*after* the summary judgment motions were resolved. *See* C.A. App. 372. No such evidence was before the district court at summary judgment. *See, e.g.*, J.A. 53, 131. Because review of the district court's resolution of summary judgment motions is "limited to the record presented to the district court at the time of summary judgment," Petitioners cannot rely Campanale's trial testimony here. *See Griffin v. Sirva Inc.*, 835 F.3d 283, 287 (2d Cir. 2016).

Petitioners' arrest is simply that: (1) Respondents were present at a licentious house party but did not rent or own the house themselves; and (2) the landlord was not present, and Respondents did not know his name. For the reasons discussed in Part I.C, *supra*, these facts do not amount to probable cause of unlawful trespass. Attending a party in a rental unit cannot possibly give rise to criminal liability whenever the tenant overstays her lease. Absent affirmance, this Court should remand for trial. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994) (plurality).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

NATHANIEL P. GARRETT
Counsel of Record
JONES DAY
555 California Street,
26th Floor
San Francisco, CA 94104
(415) 626-3939
ngarrett@jonesday.com

CHARLOTTE H. TAYLOR
JULIA FONG SHEKETOFF
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939

GREGORY L. LATTIMER
1200 G Street NW
Washington, DC 20005

Counsel for Respondents

July 12, 2017

RECORD AND BRIEFS

FILED
SEP - 1 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

KARL A. RACINE
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
ARGUMENT	2
I. Considered From The Perspective Of A Reasonable Officer On The Scene, The Totality Of The Circumstances Provided Probable Cause To Arrest	2
A. The officers had a reasonable basis to arrest for trespass	2
1. As the officers knew, the partiers lacked the right to be in the home, had obvious reasons to think so, and acted suspiciously	3
2. To a reasonable officer on the scene, the partiers' reliance on "Peaches" and her purported invitation would not undermine probable cause but reinforce it	9
B. Like the court of appeals, respondents apply a version of probable cause that is too demanding, inflexible, and impractical	12
C. It is too late for respondents to dispute previously undisputed facts	15
II. Alternatively, The Officers Are Entitled To Qualified Immunity	19
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page(s)
Adams v. Williams, 407 U.S. 143 (1972)	1
Carcieri v. Salazar, 555 U.S. 379 (2009)	16
Florida v. Harris, 568 U.S. 237 (2013)	1
Hunter v. Bryant, 502 U.S. 224 (1991)	19
Illinois v. Gates, 462 U.S. 213 (1983)	1
Illinois v. Wardlow, 528 U.S. 119 (2000)	6-7
Kaley v. United States, 134 S. Ct. 1090 (2014)	1
Maryland v. Pringle, 540 U.S. 366 (2003)	1, 8, 9, 10, 13
McGloin v. United States, 232 A.2d 90 (D.C. 1967)	15
Mullenix v. Luna, 136 S. Ct. 305 (2015)	19-20
OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015)	16-17
Ohio v. Robinette, 519 U.S. 33 (1996)	14
Ortberg v. United States, 81 A.3d 303 (D.C. 2013)	14, 15

TABLE OF AUTHORITIES—Continued

Page(s)

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) 16

Pernell v. Southall Realty,
416 U.S. 363 (1974) 14

Peters v. New York,
392 U.S. 40 (1968) 7

Saucier v. Katz,
533 U.S. 194 (2001) 20

Tillman v. Wash. Metro. Area Transit Auth.,
695 A.2d 94 (D.C. 1997) 3-4

United States v. Briggs,
720 F.3d 1281 (10th Cir. 2013) 9

United States v. Santos,
553 U.S. 507 (2008) 1

White v. Pauly,
137 S. Ct. 548 (2017) 19, 20, 21

Wilson v. United States,
162 U.S. 613 (1896) 10

Wong Sun v. United States,
371 U.S. 471 (1963) 8

Wright v. West,
505 U.S. 277 (1992) 10

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017) 20

TABLE OF AUTHORITIES—Continued

Constitution Page(s)

U.S. Const. amend. IV ..... *passim*

Statutes

D.C. Code § 48-902.08 (2008) 6

D.C. Code § 48-904.01 (2008) 6

Rules

Sup. Ct. R. 14.1 14

Sup. Ct. R. 15.2 16

REPLY BRIEF FOR PETITIONERS

Settled Fourth Amendment principles call for reversal. Officers have probable cause to arrest whenever the totality of the circumstances, objectively viewed from their perspective, shows a fair probability of criminal activity. *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). That is "not a high bar." *Kaley*, 134 S. Ct. at 1103. Probable cause is "practical and common-sensical," and looks to how "reasonable and prudent people, not legal technicians," would perceive a potential crime. *Florida v. Harris*, 568 U.S. 237, 244 (2013) (brackets omitted). It requires neither "a prima facie showing" of criminal activity, *Illinois v. Gates*, 462 U.S. 213, 235 (1983), nor "the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149 (1972). And, critically, the evidence may be circumstantial; indeed, it usually must be as to a suspect's state of mind. *United States v. Santos*, 553 U.S. 507, 521 (2008) (plurality op.).

Respondents do not deny that the court of appeals departed from these principles, nor do they defend those departures. While respondents try to reconcile their position with settled law, their attempt simply reveals how much they misapply it. Meanwhile, they cannot salvage an entitlement to trial through a last-ditch effort to dispute some facts for the first time in their brief on the merits in this Court. Those disputes plainly come too late. And they are academic in any event, because there was probable cause as a matter of law based just on the facts respondents agree even now are undisputed plus those directly stated, with their prior agreement, in the questions on which this Court granted certiorari.

The existence of probable cause resolves this case. But if there is any doubt, petitioners are entitled to qualified immunity. Despite respondents' strained arguments for trial, probable cause was at least arguable. The on-scene officers should not be liable for a million-dollar judgment.

ARGUMENT

I. Considered From The Perspective Of A Reasonable Officer On The Scene, The Totality Of The Circumstances Provided Probable Cause To Arrest.

A. The officers had a reasonable basis to arrest for trespass.

After the officers responded to, then investigated, a complaint about a home intrusion, they had ample reason to think that those found inside knew or at least should have known that they had no right to throw their unauthorized, debauched party in this unfurnished, unattended home. This was especially true given the partiers' suspicious behavior after the officers arrived and their reliance on the purported invitation of an absent host known only as "Peaches," who proved evasive and untruthful.

Probable cause to arrest for trespassing is based on the totality of the circumstances, viewed from the common-sense perspective of a reasonable officer on the scene who cannot see into a suspect's mind. Because there was probable cause as a matter of law given the facts properly treated as undisputed (*see infra* at 15-19), this Court should reverse for entry of judgment for petitioners.

1. As the officers knew, the partiers lacked the right to be in the home, had obvious reasons to think so, and acted suspiciously.

a. Beginning with the fact that the partiers entered the home without actual permission, it was reasonable to infer that they either knew or at minimum should have known that they lacked authority to be there. In many situations, police officers assessing probable cause—and even juries considering reasonable doubt—may infer a culpable state of mind from the act itself. (Pet. Br. 17-18.) This case is no exception, since it is undisputedly rare that someone would enter a private home while reasonably unaware he actually lacks permission. (*Compare* Pet. Br. 17-18, *with, e.g.*, Resp. Br. 34-35 (discussing party invitations made *with* authority to invite).) A prudent, experienced officer could believe the straightforward explanation: respondents were trespassing, knowingly or at least negligently.

Of course, officers will usually have facts beyond that of unauthorized presence in a home, and so an inference of *mens rea* from *actus reus* might not always be reasonable. Respondents argue, for instance, that an apparent trespasser might lack criminal capacity due to age or insanity. (Resp. Br. 48.) But there was no claim of incapacity here, or anything else that would make the inference unreasonable. To the contrary, the surrounding circumstances heavily strengthened the inference. (*See infra* at 5-11.) As the District of Columbia Court of Appeals recognized in discussing another trespass statute, "it would be an unusual case" where the unlawful act was undoubtedly proven but the requisite *mens rea* so clearly lacking that police could not even arrest.

Tillman v. Wash. Metro. Area Transit Auth., 695 A.2d 94, 96 (D.C. 1997).[1]

Respondents also argue that inferring *mens rea* from the act of trespassing is "more inappropriate in a landlord-tenant context." (Resp. Br. 48.) This argument might bear weight if this were such a situation. But the officers knew from Mr. Hughes, the homeowner, that there was no lease, that "Peaches"—the party's purported host—was not a tenant, and that *no one* was authorized to be inside the home. (Pet. Br. 4-5.) Whatever inferences might be drawn when a hypothetical tenant overstays her lease (Resp. Br. 48, 57), that was not what the officers encountered here. Similarly, though respondents assert that the house was "secured with a lock and key" (Resp. Br. 38), the evidence is just that one of the partiers had seen "Peaches" with keys—not that the officers knew as much (J.A. 41).

Moreover, the mere possibility of an innocent explanation for an act that would otherwise be criminal does not preclude police officers from inferring culpability from the *actus reus* for purposes of probable cause. While a prosecutor might ultimately decline to bring charges, or a jury might find reasonable doubt, this case is about whether an officer may arrest in the first instance. The officer, assessing the totality of the

---

[1] Contrary to respondents' claim, petitioners do not argue that probable cause categorically exists "*whenever* someone enters a private home without the permission of the owner." (Resp. Br. 47-48.) Similarly, despite respondents' claim (Resp. Br. 10-11), the parties agree that, for probable cause, an officer must have at least "some evidence" on each element of an offense (Resp. Br. 15 n.3). The proper approach, though, is not that of a lawyer, but of a reasonable officer viewing the totality of the circumstances. (Pet. Br. 35-36.)

circumstances in real time, does not have to conclusively rule out the possibility of innocent behavior before arresting.

b. Of course, there was much more to support an inference of respondents' culpability here. Responding to neighbors' complaints, officers found a large party, late at night, in a vacant home with naked and scantily clad women, evidence of illegal drug use and prostitution, and no owner or tenant present. (Pet. Br. 2-4.) Nothing at all suspicious, respondents insist. In reality, these were clear indicators to the partiers that their presence was unauthorized, or so a reasonable officer might conclude.

First, it reasonably appeared that no one was living in the home. Respondents do not deny that the only pieces of furniture were some folding chairs downstairs and a mattress on the floor upstairs. (Resp. Br. 37.) Even if the windows had shades, candles were lit, and some utilities were working (Resp. Br. 37), the home was basically unfurnished. And respondents do not dispute that the house was in disarray, with cups littering the floor and open and used condoms lying around. (Pet. Br. 3; J.A. 165; C.A. App. 87.) The home's appearance thus strongly indicated that the only actual use of the house was for the party, not habitation. The natural conclusion, or at minimum a reasonable one, was that the partiers were taking advantage of the fact that the home was vacant and thus unguarded against their late-night entry. (Pet. Br. 19; U.S. Br. 16.)

Notably, respondents largely abandon the court of appeals' explanation for the home's condition: that the home had a new tenant who had not yet moved in but chose to throw, then leave, a party for people who did not know her name. (Pet. App. 16a-17a.) Respondents

now suggest that perhaps the tenant could not afford furnishings. (Resp. Br. 38-39.) The officers were not required, on the scene, to anticipate and accept this alternative explanation either. While such an instance might conceivably occur, it still remained a reasonable inference that this house was uninhabited, and obviously so.

Second, the evidence of illegal drug use and prostitution was another sign to the partiers that the person lawfully in charge of the home did not authorize their presence. Respondents admit the party was "licentious" (Resp. Br. 3), and the officers had evidence of the conspicuous exchange of money for sexual acts (Pet. Br. 3). While respondents argue that marijuana is commonly used today (Resp. Br. 53), its possession was unquestionably criminal under District law at the time, *see* D.C. Code §§ 48-902.08(a)(6), 48-904.01(d) (2008). Common sense indicates that a typical homeowner or renter would not permit strangers to engage in illegal activities in his or her home for many reasons, including legal risks of a nuisance or eviction proceeding. (Pet. Br. 20-21; U.S. Br. 16.)

Contrary to respondents' arguments, an experienced officer could reasonably perceive that illegal drug use and prostitution are directly connected with unlawful presence in a vacant home. These are activities that would lead to arrest if done in public and thus need to be concealed by those wishing to engage in them. (Pet. Br. 19-20.) A vacant home provides a prime location to engage in such behavior without detection. Although this proposition *is* supported by empirical study (Pet. Br. 19), respondents are wrong to suggest that empirical evidence is even necessary (Resp. Br. 53). *See Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (disclaiming any need for

"empirical studies" and "scientific certainty" in drawing inferences from suspicious behavior).

Third, the absence of any owner or tenant—or even the party's alleged host—was itself highly suspicious. Respondents protest that "Peaches," whom some partiers identified as the host, told police that she had just gone to the store. (Resp. Br. 36.) Perhaps. But at that time of night—around 2:00 a.m.—an officer could find that explanation far-fetched and think it likelier that she had simply gone to her actual home for the night. Moreover, regardless of any explanation given for her absence, it was reasonable to believe that the lack of any purported owner or tenant at the party provided the partiers some notice that they did not have actual authority to be there, especially given the nature of this party.

In any event, respondents' attempt to explain away these facts as unsuspicious and unremarkable does not *obviously* succeed, to say the least. While respondents claim that this was "a typical, if licentious, house party in a low-income neighborhood" (Resp. Br. 40), the neighbors who complained to police about the disruption to their community and "illegal activities" (J.A. 112) presumably disagreed. And a reasonable officer might fairly conclude that the home's condition and the conduct of the partiers amply supported the inference that they knew or should have known that they did not have valid permission to be there.

c. The partiers' interaction with the police provided still more evidence of culpability. Respondents minimize the fact that they scattered and hid when police entered (Resp. Br. 51-52), but attempted flight from police plainly supports probable cause. *Peters v. New York*, 392 U.S. 40, 66-67 (1968). Moreover, petitioners are not relying on flight "standing alone"

with no information "relating the suspect to the evidence of crime." (Resp. Br. 51.) There was not only the completed *actus reus*—the partiers entered the home without the owner's permission—but also the other incriminating circumstances surrounding the entry. It is respondents who wish to consider the fact of flight "standing alone," in isolation from the other circumstances known to the officers. This Court has consistently rejected such a divide-and-conquer approach. *See, e.g.*, *Pringle*, 540 U.S. at 372 n.2.

Despite respondents' alternative explanations (Resp. Br. 51-52), the partiers' flight was evidence of a culpable mental state. Respondents do not claim that they failed to recognize that uniformed officers were at the door. *Cf. Wong Sun v. United States*, 371 U.S. 471, 482-83 (1963). Nor did the officers' actions here give innocent persons reason to flee in fear, as respondents argue. (Resp. Br. 52.) The officers knocked on the door; they did not batter it down or force it open. (J.A. 92-93.) There is no suggestion that they said anything particularly threatening or alarming. The officers did not enter the home in "droves" (Resp. Br. 52), and they were quite outnumbered by the (at least) 21 partiers (J.A. 133, 155; Pet. App. 47a-48a). Moreover, one partier fled on the officers' mere approach, before they could have even done anything alarming to innocent persons. (J.A. 112.)

While respondents suggest that maybe not every partier fled (Resp. Br. 52), that does not negate the evidence of flight or the inferences a reasonable officer could draw from it. (U.S. Br. 16-17.) Because the partiers were closely associated together in a common activity in a private home, it would be reasonable to think that they would have had similar information

about the illegitimacy of any received invitation. The flight of some would thus support probable cause for all. *See Pringle*, 540 U.S. at 372-73; *United States v. Briggs*, 720 F.3d 1281, 1290-92 (10th Cir. 2013).

Adding to the suspicion was the partiers' difficulty explaining who had permission to invite them into the home. (Pet. Br. 4; U.S. Br. 17-18.) Even if invitees sometimes bring additional guests (Resp. Br. 35), the partiers here still should have been able to state, or state consistently, who had given them permission to be there. Those who are invited to join a party typically know—or at minimum *should* know—who purports to have a right to invite them into the house. A prudent officer could believe that the partiers were attempting to obfuscate the investigation, or that they revealed a glaring disregard for how they could legitimately be in someone else's home. Either way, an officer would have good reason to believe that they knew or should have known they lacked authority to be there.

2. To a reasonable officer on the scene, the partiers' reliance on "Peaches" and her purported invitation would not undermine probable cause but reinforce it.

a. The partiers' reliance on "Peaches" provided affirmative evidence of culpable *mens rea*. Because the partiers and "Peaches" had a common enterprise in together using the home for the party, her knowledge that they all lacked the owner's permission may be imputed to the partiers. (Pet. Br. 23-24.) To distinguish *Pringle* on this point, respondents argue that they were not similarly situated to "Peaches" because she was the party's host. (Resp. Br. 55.) But this Court in *Pringle* rejected a similar distinction among car occupants; it upheld probable cause to

arrest someone who was not the driver, the car owner, or the passenger in the backseat where the drugs were located. 540 U.S. at 368. The fact that "Peaches" eventually admitted knowing that the entry was unauthorized did not dispel her common enterprise with the partiers or the likelihood that such knowledge had been shared among them. (Resp. Br. 55.) Indeed, respondents do not question the many common-sense reasons why such knowledge would have been shared to further their enterprise. (Pet. Br. 23.)[2]

Respondents also argue that their claim of legitimate invitation from "Peaches," even if discredited, cannot be "affirmative proof of their guilty state of mind." (Resp. Br. 32-33, 54.) But surely it can. Respondents are incorrect that the officers would have to "disregard" how suspicious "Peaches" was "in the probable cause analysis," as if the partiers had never relied on her. (Resp. Br. 33.) Both the totality-of-the-circumstances test and other well-established law provide that false exculpatory statements can be "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality op.); *accord Wilson v. United States*, 162 U.S. 613, 620-21 (1896).

Since the partiers had used "Peaches" to justify their presence, her evasive and untruthful behavior when questioned about it gave the officers reason to believe that she and the partiers had together fabricated an exculpatory story. At the least, her

---

[2] Despite respondents' allusion to forfeiture (Resp. Br. 54), petitioners maintained below that the behavior of "Peaches" was evidence of respondents' culpability. (*E.g.*, C.A. Appellants' Br. 29-30.) The issue is properly before this Court in any event because the court of appeals relied upon the supposed invitation from "Peaches" even though she admitted she lacked authority to extend it. (Pet. App. 11a-12a.)

manifest unreliability suggested that the partiers already knew or should have known that her authority to extend the invitation was suspect. These are the types of reasonable credibility judgments that officers may make in assessing *mens rea* on the scene of an apparent crime.

b. Even if the partiers' reliance on "Peaches" was not affirmative evidence of guilt, a reasonable officer did not have to accept it as conclusive evidence of innocence. Although respondents argue that "Peaches" corroborated the purported invitation (Resp. Br. 30-31), she was evasive, repeatedly hung up the phone, and refused to come to the house because she said she would be arrested. (Pet. Br. 4.) She also blatantly lied to police and had trespassed herself. (Pet. Br. 4.) Respondents do not address the fact that she had amply demonstrated her lack of credibility. (Pet. Br. 24-25; U.S. Br. 19.) Nor do they address her lack of accountability, given that police did not have her real name and she would not make herself available in person. (Pet. Br. 24-25.) A reasonable officer could therefore consider respondents' story, at minimum, uncorroborated.

That leaves respondents' untenable argument that their explanation for being in the home was "unrebutted." (Resp. Br. 30.) Respondents argue that "[t]here was no evidence suggesting" that the statements of some that "Peaches" had invited them might have been untrue. (Resp. Br. 30.) This argument simply ignores all of the previously discussed evidence gathered during the investigation, all of which controverts their innocent explanation. Just as a juror

would not have to credit it, neither did an on-scene police officer. (U.S. Br. 18-19.)[3]

Finally, respondents' argument simply does not address the question whether, even if there had been an invitation, their reliance on it was reasonable. Once again, the information known to the officers reasonably indicated otherwise: the partiers at least should have known that the homeowner had not authorized the invitation or their presence.

B. Like the court of appeals, respondents apply a version of probable cause that is too demanding, inflexible, and impractical.

1. Respondents do not dispute that, in reaching a different conclusion on these facts, the court of appeals departed from standard Fourth Amendment principles. Specifically, they do not defend how the court required probable cause as to each element of a crime, rather than for the crime as a whole. (Pet. Br. 35; Resp. Br. 15 n.3.) Nor do they defend how the court heightened the probable-cause analysis by reasoning that a suspect's claimed excuse defeats probable cause absent "conflicting information" in the form of direct rather than circumstantial evidence of the suspect's mental state. (Pet. Br. 27-35.)

While not defending what the court of appeals did, respondents nevertheless seek to maintain a heightened standard—one that is likewise too

---

[3] Respondents again erroneously claim that petitioners propose a categorical rule: that officers *never* need credit the accounts of those on the scene. (Resp. Br. 31.) Not so. While the Fourth Amendment's reasonableness standard gives officers substantial leeway to evaluate claims of innocent mental states (Pet. Br. 27-31), whether it is reasonable to discredit such a claim depends, as always, on the totality of the circumstances.

demanding and unrealistic and gives undue weight to suspects' accounts. Respondents reject the circumstantial evidence of culpability in this case as "no evidence" at all. (*E.g.*, Resp. Br. 46.) Piece after piece of evidence, they insist, is not even "[p]robative." (Resp. Br. 47, 49, 51, 53.) The only explanation for this is that respondents are applying in practice a heightened probable-cause standard that they have disavowed in theory. Indeed, at points, they argue about what is needed for "criminal liability" rather than just probable cause. (*E.g.*, Resp. Br. 49.)

The flaws in respondents' analysis are apparent. After one fleeting acknowledgment of the totality-of-the-circumstances test (Resp. Br. 11), respondents isolate each fact upon which petitioners rely to support culpability. (Resp. Br. 32-40, 46-56.) They then posit an alternative explanation for the isolated fact that is consistent with an innocent mental state. (Resp. Br. 32-40, 46-56.) Upon doing so, respondents eliminate the fact from consideration, denying it any weight in the probable-cause inquiry. (Resp. Br. 32-40, 46-56.) Under respondents' analysis, it matters not that an alternative explanation could seem implausible to a reasonable officer based on his judgment, experience, and direct observations. But even if individual facts viewed in isolation might seem ambiguous, in combination—that is, in the totality of the circumstances—they can paint a clear enough picture for probable cause. *Pringle*, 540 U.S. at 372 n.2.

This is not a case where, as respondents suggest, the officers "close[d] their eyes" or ears to the partiers' explanation for their presence and then arrested indiscriminately. (Resp. Br. 32.) To the contrary, the officers investigated the partiers' explanation, but received incomplete and inconsistent accounts of who

had permitted them to be there. (Pet. Br. 4.) When eventually some told of "Peaches," officers called her—and called her back even after she repeatedly hung up on them and refused to return to the house. (Pet. Br. 4.) Following up on those conversations, officers spoke to Mr. Hughes, the homeowner, as well. (Pet. Br. 4-5.) Taking the partiers' explanation into consideration along with the other facts casting doubt on its veracity and reasonableness, an objectively reasonable officer was entitled to discredit the explanation.

2. Although this Court need not analyze District of Columbia Court of Appeals precedent to resolve this case, respondents repeat the error of the court below in expecting officers to have parsed that precedent closely to divine that the putative *mens rea* element of the offense was an element at all. On-scene officers are not lawyers, and should not be treated as such.

As previously explained (Pet. Br. 36-40), a prudent officer could have believed that respondents' explanation of invitation went only to an affirmative defense.[4] Respondents generally fail to address the petitioners' discussion of the case law that would have supported this belief (Pet. Br. 36-38), and instead rely on *Ortberg v. United States*, 81 A.3d 303 (D.C. 2013), a decision that was issued years *after* the arrests and recognized

---

[4] This question was presented and decided below (C.A. Appellants' Br. 20-25; Pet. App. 10a-11a) and is fairly included in the probable-cause and qualified-immunity questions presented to this Court as a "predicate to an intelligent resolution" of both, since both analyses depend on the elements of the crime. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996); *see* Sup. Ct. R. 14.1. Moreover, because this Court is the ultimate interpreter of District law, *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974), it owes no deference to the District of Columbia Circuit (*contra* Resp. Br. 20).

that earlier case law about the culpable mental state "lacked some precision," *id.* at 307. A reasonable officer did not have to predict the analysis in *Ortberg* or the different but no less intricate analysis respondents now propose. (Resp. Br. 17-23.)

Moreover, respondents' argument fails on its own terms. They equate the *mens rea* requirement in *Ortberg* with the pre-existing requirement that the entry be against the owner's "expressed will, that is, after warning to keep off." *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). But the two are quite different. Whether a homeowner has posted a "no trespassing" sign is an entirely distinct question from whether an apparent trespasser actually and reasonably relied on a third-party invitation. It does not appear that the expressed-will requirement even applied to private homes, as opposed to restricted areas of public buildings. *See id.* ("[S]urely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry."). Nothing about the expressed-will requirement resolves whether the claim of invitation here went to an element rather than an affirmative defense.

C. It is too late for respondents to dispute previously undisputed facts.

In their brief on the merits, respondents raise entirely new arguments to dispute some (but not all) of the facts underlying their arrests. (Resp. Br. 27-30.) This effort comes far too late. The petition for writ of certiorari stated these facts, including in the questions presented, and respondents' brief in opposition did not dispute any of them. (*Cf.* Br. in Opp. 20-22, 31 n.3 (disputing other factual assertions).) Nor were these supposed disputes raised below when petitioners

relied upon the same facts to argue for summary judgment in their favor. Following its standard practice, this Court should treat these facts as established.

1. Most notably, respondents newly contest the fact that "Peaches" lacked permission from the homeowner, Mr. Hughes, to invite them. They dispute both that he told an officer that their entry was unauthorized and that "Peaches" admitted to another officer that she lacked authority over the home. (Resp. Br. i, 28-30.) They thus seek, *sub silentio*, to transform this case from one about *mens rea* into one in which the *actus reus* itself is in doubt.

The questions accepted for review, however, specifically include the underlying fact that "the owner . . . inform[ed] police that he ha[d] not authorized entry." (Pet. i.) Indeed, respondents included that fact in their own questions presented and began their brief in opposition by explaining that "[t]his case presents the question whether officers lack probable cause to arrest," where "the police discover that the [alleged invitor] did not in fact possess lawful authority to extend the invitation." (Br. in Opp. i, 1.) Reversing course, respondents now seek to change the terms on which this Court chose to grant review by disputing a fact stated in the questions presented. This they cannot do. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015); Sup. Ct. R. 15.2; *see also Carcieri v. Salazar*, 555 U.S. 379, 395-96 (2009) (brief in opposition's failure to contest factual assertion in petition "alone is reason to accept this as fact for purposes of [this Court's] decision").

What is more, in the proceedings below, respondents never disputed that "Peaches" lacked authority, thereby forfeiting the issue. *See OBB Personenverkehr*

AG v. Sachs, 136 S. Ct. 390, 397-98 (2015). Indeed, respondents agreed with the district court that "the overall facts were generally undisputed" and quoted with approval that court's statement that the homeowner told an officer both that "['Peaches'] did not have a lease for the property and that [respondents] did not have his permission to be in the house." (C.A. Appellees' Br. 3; *accord* C.A. Oral Arg. Recording 12:47 to 13:00, 20:20 to 20:32 (confirming that Mr. Hughes "had not given permission").) Respondents understandably accepted this fact, having presented no evidence—such as any testimony from "Peaches" or Mr. Hughes—to dispute it.[5]

Given this previously undisputed fact, no more is necessary to justify judgment for petitioners. With the fact that the partiers lacked authority and the other facts respondents do not dispute even now—most notably the state of the house, the nature of the party, and the absence of any host at the scene—the officers had sufficient reason to believe that the partiers knew or should have known they had no right to be there. (*See supra* at 3-7.) Regardless of respondents' remaining attempts to now throw other facts into dispute, judgment for petitioners is warranted.

---

[5] Respondents' decision not to dispute this fact earlier is understandable, given that two different officers—one who spoke with both Mr. Hughes and "Peaches," and one with "Peaches"—corroborated each other (J.A. 53-54, 99-100, 165-66); other officers confirmed hearing contemporaneously about those conversations (J.A. 53-54, 131-32); and "Peaches," evincing consciousness of guilt, was evasive and refused to return to the home (J.A. 53-54, 165). Similarly, the weaknesses in respondents' newfound claims of other disputes of fact may help explain why these claims were not raised below.

2. In any event, the other new disputes are also waived or forfeited. First, it is too late for respondents to contest "whether anyone fled or hid from the police." (Resp. Br. 28.) The petition asserted that when "uniformed officers knocked and entered, the people inside scattered into other rooms" and that officers later found "a man hiding in a closet." (Pet. 3, 17.) Opposing the petition, respondents took no issue with this, even agreeing: "The evidence is that when an individual opened the door [for the police], one officer 'could see people in the house scattering into different rooms.'" (Br. in Opp. 23.) So too in the court of appeals, petitioners relied upon this evidence to support their entitlement to summary judgment (C.A. Appellants' Br. 29), without any dispute in respondents' brief. And in the district court, respondents themselves raised on summary judgment the evidence that partiers scattered upon police entry. (J.A. 190.) This fact is established.

Second, while respondents now dispute whether officers smelled marijuana in the home (Resp. Br. 28), they never disputed it previously. The petition so stated without challenge in respondents' opposition. (Pet. 3.) This fact was also presented to the courts below without dispute. (C.A. Appellants' Br. 7-8, 30; J.A. 192.)

And third, it is too late for respondents to dispute receipt of the concerned neighbors' "tip" that the house was supposed to be vacant. (Resp. Br. 27.) The petition described a complaint to police about a loud party and possible illegal activities in a house that had been vacant for several months. (Pet. 3.) The brief in opposition did not dispute this fact. So too below, petitioners asserted that a "neighbor had complained to police about a large, loud party in a house that was

supposed to be vacant," without any objection that the police may never have received such a tip. (C.A. Appellants' Br. 4.)[6]

3. The time for respondents to argue about genuine disputes of fact has long passed. Reaching such disputes now would unfairly prejudice petitioners. In particular, petitioners could have presented additional evidence in the district court to overcome respondents' arguments if they had been timely made, because they are not based on respondents' own affirmative evidence. Even on the existing record, petitioners could have refuted the multiple arguments that respondents now make as to each of the several facts at issue and disproved any genuine dispute, especially given that the arguments are questionable at best.

The Court should decide this case as it was presented at the certiorari stage and below, and hold that petitioners had probable cause as a matter of law based on the established historical facts.

II. Alternatively, The Officers Are Entitled To Qualified Immunity.

Even if probable cause were lacking, qualified immunity applies here. A "reasonable officer could have believed [the arrests] to be lawful, in light of clearly established law and the information . . . officers possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). Whether the law is clearly established must be considered "in light of the specific context of the case," and under existing precedent the

---

[6] While respondents objected below based on hearsay, the petitioner officers, who learned of the tip from other officers, were permitted to rely upon it. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).

constitutional question must be "beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). At base, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). Any mistake about the existence of probable cause here was a reasonable one, and exactly the type of mistake for which qualified immunity provides protection.[7]

Seeking only to survive summary judgment against them on this issue, respondents rely on their new attempts to dispute the facts. As discussed, these arguments have been waived or forfeited. (*See supra* at 15-19.) It would be particularly inappropriate to reach these arguments here because a ruling on qualified immunity "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *see White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam).

In any event, even if *all* of the disputes respondents newly raise had merit, the officers would still be entitled to qualified immunity as a matter of law for two reasons. First, it was unclear at the time that the putative *mens rea* element was an element at all, rather than an affirmative defense. (*See supra* at 14-15.) But second, even if this had been clearly established, respondents concede that only "some evidence" of *mens rea* was necessary. (Resp. Br. 15 n.3.) Even under their cramped view of the historical facts

---

[7] A finding of qualified immunity would similarly entitle petitioners to a privilege against the common-law claims, and so independently justify entry of judgment for petitioners on all claims. (Pet. Br. 42 & n.4.) Respondents do not dispute that, if the privilege applies, it defeats all of the common-law claims at issue.

(Resp. Br. 2-3), there was at least *some* evidence of *mens rea* given the essentially unfurnished nature of the house, the activities at the party, and the absence of any homeowner or renter from the scene. The officers' entitlement to qualified immunity becomes even clearer when considering the other facts established below without objection from respondents. (Pet. Br. 43-47; U.S. Br. 24-29.)[8]

Against this, respondents distort petitioners' arguments. Petitioners are not contending that, for the law to be clearly established, there must always be "an existing case identical in its minute particulars." (Resp. Br. 42.) But this is far from the obvious case in which general Fourth Amendment principles would suffice to deny qualified immunity. (Pet. Br. 47-48 (citing cases).) Those principles failed to give the on-scene officers fair notice that the particular facts here did not provide probable cause to arrest. Such notice would have required, at minimum, some precedent finding a Fourth Amendment violation by "an officer acting under similar circumstances." *White*, 137 S. Ct. at 552. Respondents point to no such case. In fact, they embrace the ample case law that *supported* the lawfulness of the arrests. (Resp. Br. 42-45.)

Perhaps most revealing, respondents do not even acknowledge that four judges of the District of Columbia Circuit determined that there was probable

---

[8] Respondents do not dispute that Officers Parker and Campanale had the same material information upon which petitioners rely for probable cause. (Pet. Br. 44.) But respondents fail to appreciate that an additional factor supporting qualified immunity is these officers' reliance on their on-scene supervisor's decision to arrest. It was reasonable for them to trust their superior's judgment under these circumstances. (Pet. Br. 49.)

cause for the officers to arrest respondents. (Pet. Br. 48; *see also* U.S. Br. 13-22; States' Br. 5-15.) This alone demonstrates the injustice of imposing a million-dollar judgment on petitioners. (Pet. Br. 48-49; U.S. Br. 29.) The present case is, indeed, a "fairly easy" one for qualified immunity. (Pet. App. 136a.)

CONCLUSION

The Court should reverse the judgment below and direct entry of summary judgment for petitioners or, at minimum, remand for further proceedings.

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

TODD S. KIM
Solicitor General
Counsel of Record

LOREN L. ALIKHAN
Deputy Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

D.C. OFFICE OF THE
ATTORNEY GENERAL
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
(202) 724-6609
todd.kim@dc.gov

Counsel for Petitioners

September 2017

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 12 2017
OFFICE OF THE CLERK

No. 15-1485

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

THEODORE WESBY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
DOUGLAS N. LETTER
BARBARA L. HERWIG
H. THOMAS BYRON III
DANA KAERSVANG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Police officers found late-night partygoers inside a vacant home belonging to someone else. After giving conflicting explanations of their presence, some partygoers claimed that a person known as "Peaches," who was not at the party, had invited them. The lawful owner told officers that he had not authorized entry by anyone. The officers arrested the partygoers for unlawful entry in violation of D.C. Code § 22-3302 (Supp. 2008). The questions presented are:

1. Whether police officers had probable cause to arrest respondents for unlawful entry.

2. Whether, even if the officers lacked probable cause to arrest, they were entitled to qualified immunity.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 10
Argument:
A. Officers had probable cause to arrest respondents for unlawful entry 13
B. At a minimum, the officers were entitled to qualified immunity 22
Conclusion 32

TABLE OF AUTHORITIES

Cases:

Anderson v. *Creighton*, 483 U.S. 635 (1987) 23
Anderson v. *DeCristofalo*, 494 F.2d 321 (2d Cir. 1974) 28
Artisst v. *United States*, 554 A.2d 327 (D.C. 1989) 27
Ashcroft v. *al-Kidd*, 563 U.S. 731 (2011) 24, 29
Beck v. *Ohio*, 379 U.S. 89 (1964) 11, 13, 25
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 2, 23
Bodzin v. *City of Dallas*, 768 F.2d 722 (5th Cir. 1985) 28
Borgman v. *Kedley*, 646 F.3d 518 (8th Cir. 2011) 29
Brinegar v. *United States*, 338 U.S. 160 (1949) 21
Brosseau v. *Haugen*, 543 U.S. 194 (2004) 31
Carroll v. *Carman*, 135 S. Ct. 348 (2014) 23, 30
Devenpeck v. *Alford*, 543 U.S. 146 (2004) 14
Elonis v. *United States*, 135 S. Ct. 2001 (2015) 22
Filarsky v. *Delia*, 566 U.S. 377 (2012) 23
Finigan v. *Marshall*, 574 F.3d 57 (2d Cir. 2009) 28
Florida v. *Harris*, 133 S. Ct. 1050 (2013) 14, 19

Cases—Continued: Page

Gerstein v. *Pugh*, 420 U.S. 103 (1975) 13
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 23
Hope v. *Pelzer*, 536 U.S. 730 (2002) 2, 30
Hunter v. *Bryant*, 502 U.S. 224 (1991) 25, 30
Hutton v. *Strickland*, 919 F.2d 1531 (11th Cir. 1990) 28
Illinois v. *Andreas*, 463 U.S. 765 (1983) 14
Illinois v. *Gates*, 462 U.S. 213 (1983) 11, 13, 14, 21
Illinois v. *Wardlow*, 528 U.S. 119 (2000) 17
Kaley v. *United States*, 134 S. Ct. 1090 (2014) 11, 13, 14
McGloin v. *United States*, 232 A.2d 90 (D.C. 1967) 27
Michigan v. *DeFillippo*, 443 U.S. 31 (1979) 13
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 23, 32
Mullenix v. *Luna*, 136 S. Ct. 305 (2015) 12, 23, 24, 30
Ortberg v. *United States*, 81 A.3d 303 (D.C. 2013) 15
Paff v. *Kaltenbach*, 204 F.3d 425 (3d Cir. 2000) 29
Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) 18
Reichle v. *Howards*, 566 U.S. 658 (2012) 24, 26
Safford Unified Sch. Dist. #1 v. *Redding*, 557 U.S. 364 (2009) 24
Sibron v. *New York*, 392 U.S. 40 (1968) 17, 31
State v. *Newcomb*, 20 A.3d 881 (N.H. 2011) 28
Tillman v. *Washington Metro. Area Transit Auth.*, 695 A.2d 94 (D.C. 1997) 12, 26, 27, 31
United States v. *Arvizu*, 534 U.S. 266 (2002) 14, 19, 20, 21
United States v. *Santos*, 553 U.S. 507 (2008) 15
White v. *Pauly*, 137 S. Ct. 548 (2017) 24, 30
Wilson v. *Layne*, 526 U.S. 603 (1999) 23, 29
Wilson v. *United States*, 162 U.S. 613 (1896) 18
Wright v. *City of Philadelphia*, 409 F.3d 595 (3d Cir. 2005) 28

Case—Continued: Page

Wright v. *West*, 505 U.S. 277 (1992) 18

Constitution and statutes:

U.S. Const. Amend. IV ..... *passim*
18 U.S.C. 241 2
18 U.S.C. 242 2
42 U.S.C. 1983 ..... *passim*
D.C. Code:
§ 22-3302 (Supp. 2008) 1, 7
§ 44-224 (Supp. 1990) 26

Miscellaneous:

Criminal Jury Instructions for the District of Columbia, No. 5.401 (5th ed. 2009) 15
2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (5th ed. 2012) 12, 17, 31
2A Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* (4th ed. 2009) 15

In the Supreme Court of the United States

No. 15-1485

DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

THEODORE WESBY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether police officers who found late-night partygoers at a near-vacant home without the homeowner's permission had probable cause to arrest the partygoers based on circumstantial evidence that they had engaged in unlawful entry, in violation of D.C. Code § 22-3302 (Supp. 2008). Federal officers arrest and prosecute defendants for violating statutes containing a variety of mental-state elements. Circumstantial evidence is routinely used to form probable cause to believe that a suspect has a particular mental state under those statutes. The United States therefore has a substantial interest in the probable-cause question in this case.

This case also presents the question whether, if officers lacked probable cause to arrest respondents for unlawful entry, the officers were entitled to qualified

immunity under 42 U.S.C. 1983. The principles of qualified immunity that apply in suits against state and local officials under Section 1983 also apply in suits against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In addition, the standard for determining whether a right is "clearly established" for purposes of qualified immunity in civil litigation governs whether a criminal defendant charged under 18 U.S.C. 241 or 242 had "fair warning" that he or she was violating a constitutional right. *Hope* v. *Pelzer*, 536 U.S. 730, 740 (2002). Because the United States has interests both in ensuring the effective deterrence of unconstitutional conduct and in protecting employees from unduly burdensome litigation, the United States has a substantial interest in the qualified-immunity question in this case.

STATEMENT

1. At about 1 a.m. on March 16, 2008, the District of Columbia's Metropolitan Police Department received a complaint of "illegal activities" and loud music at a house on Anacostia Avenue in Northeast Washington, D.C. Pet. App. 4a, 47a n.3; see *id.* at 118a-119a (Kavanaugh, J., dissenting from the denial of rehearing en banc); see also J.A. 94, 98-99, 189. The caller, a former commissioner of the Advisory Neighborhood Commission, told police that the house in question had been "vacant for several months." Pet. App. 61a (citation omitted); see J.A. 94, 131. From speaking with neighbors, officers understood that partying at the house was "an ongoing problem." J.A. 131; see J.A. 94; Pet. App. 55a.

Uniformed officers responded to the house and heard loud music playing inside. Pet. App. 4a. The officers

knocked on the door and saw a man look out the window and then run upstairs. J.A. 112. They entered the home, whose door was ajar, and smelled "[a] strong odor of [m]arijuana." *Ibid.*; see Pet. App. 119a (Kavanaugh, J., dissenting from the denial of rehearing en banc); see also J.A. 96-98, 131, 165. The officers saw women dressed only in bras and thongs, "with money hanging out [from] their garter belts." Pet. App. 58a (citation omitted). Several were performing lap dances. J.A. 112. Other people were holding cash and alcoholic beverages. *Ibid.* When the officers entered, partygoers "scattered into other rooms." Pet. App. 4a; see J.A. 143. The officers found one man hiding in a closet. Pet. App. 59a; J.A. 177.

Officers observed that the home was "sparsely furnished"—consistent with its being a vacant property —with some folding chairs and a mattress. Pet. App. 119a (Kavanaugh, J., dissenting from the denial of rehearing en banc); see *id.* at 4a, 53a, 65a; see also J.A. 96-97. The house was "in disarray." Pet. App. 65a; see J.A. 112. Cups of liquor and beer were on the floor. J.A. 165. Some men and a naked woman were upstairs, where the lone mattress was located, J.A. 73-74, 96, and officers observed open condoms and a used condom on a windowsill, J.A. 112, 192.

Officers interviewed all 21 people at the house. Pet. App. 119a (Kavanaugh, J., dissenting from the denial of rehearing en banc). Those present gave conflicting accounts. *Id.* at 10a, 56a. Some said they were there for a birthday party, and others said they were there for a bachelor party, but none of the 21 partygoers identified the alleged guest of honor. *Id.* at 4a; see *id.* at 119a (Kavanaugh, J., dissenting from the denial of rehearing en banc); see also J.A. 193-194. And nobody

claimed to live there, or could identify who owned the house. Pet. App. 5a. All said they were in the building "at the 'invitation of somebody else,'" but most could not even "say who gave them permission to be in the house." *Id.* at 56a (citations omitted); see J.A. 131-132. Some said that a woman known as "Peaches" or "Tasty" was the host and had invited them, with one person asserting that Peaches was renting the house. Pet. App. 4a-5a, 48a n.4, 53a, 56a, 79a. Peaches, however, was not present. *Id.* at 4a, 53a, 56a.

An officer sought to investigate further by contacting Peaches on the phone, with the assistance of a partygoer. Pet. App. 54a. The officer reached Peaches, but she was "evasive" and gave inconsistent accounts. J.A. 53; see Pet. App. 36a-37a (Brown, J., dissenting); see also Pet. App. 50a. She told the officer she was "possibly renting the house from the owner who was fixing the house up for her" and that she "gave the people who were inside the place" permission to have a bachelor party—but she hung up when the officer pressed her. J.A. 53. When the officer called again, she "began yelling" and initially asserted she "didn't know the owner's name, but she had permission to be inside the residence," before admitting that she lacked permission and hanging up again. J.A. 54. She refused an officer's request that she come to the scene, saying that she would be arrested if she did. Pet. App. 5a, 54a.

Officers also contacted the owner of the house, Damion Hughes, who said that although he had been trying to negotiate a lease with Peaches, no one, including Peaches, had permission to be at the house. J.A. 99-100; see Pet. App. 48a, 54a n.7.

After having talked to everyone present, Peaches, and Hughes, officers arrested the 21 people at the

house for unlawful entry, a misdemeanor. Pet. App. 6a, 8a-9a. At the station, after consulting with a prosecutor, the watch commander directed that the arrestees instead be cited for disorderly conduct. *Id.* at 6a. The partygoers were cited and then released, having spent "several hours" in police custody. *Id.* at 48a-49a. Prosecutors later dropped the disorderly-conduct charges. *Id.* at 49a.

Sixteen of the 21 arrestees—respondents here—brought a civil suit seeking damages from police officers involved in the arrest and from the District of Columbia. Pet. App. 46a. Respondents asserted claims under 42 U.S.C. 1983 against five officers, including petitioners Andre Parker and Anthony Campanale, alleging that the officers had violated the Fourth Amendment by participating in respondents' arrests. Pet. App. 46a, 70a. Respondents also brought common-law false-arrest claims against the five officers and against petitioner District of Columbia on the basis of respondeat superior. In addition, respondents asserted a common-law claim of negligent supervision against the District of Columbia. *Id.* at 46a. All parties moved for summary judgment on liability. *Id.* at 47a.

2. a. The district court granted summary judgment on liability to respondents on their claims against Officers Parker and Campanale in their personal capacities, and against the District of Columbia. Pet. App. 45a-99a.[1]

---

[1] Official-capacity claims against the officer-defendants were dismissed after respondents "clarified that they [we]re proceeding against the officers solely in their individual capacities." Pet. App. 46a n.1. In addition, the district court found genuine issues of material fact existed that were relevant to the liability of the officer-defendants other than Officers Parker and Campanale, and

The district court concluded that police had lacked probable cause to arrest respondents for unlawful entry, even if the facts, which were "generally undisputed," Pet. App. 47a, were viewed in the light most favorable to petitioners, *id.* at 63a-70a. In particular, the court concluded, officers could not have found probable cause that respondents knew or should have known that their entry was not legally authorized. *Id.* at 64a-66a. The court found it "undisputed that [respondents] were expressly or impliedly invited onto the property by a woman named 'Peaches'" and, in the court's view, "nothing about what the police learned at the scene suggests that [respondents] 'knew or should have known that [they were] entering against the [owner's] will.'" *Id.* at 64a (final two sets of brackets in original). The court also concluded that Officers Parker and Campanale were not entitled to qualified immunity under Section 1983, reasoning that it was clearly established that the unlawful-entry offense requires that an entrant knew or should have known that his or her entry was against the will of the owner. *Id.* at 78a-79a.[2]

---

accordingly denied summary judgment with respect to those defendants. *Id.* at 3a, 70a-93a, 98a-99a. Respondents then voluntarily dismissed those defendants from the suit. *Id.* at 3a.

[2] The district court also found Officers Parker and Campanale liable for common-law false arrest, relying on its determinations that respondents had been arrested without probable cause and that the officers could not have had a reasonable, good-faith belief that the arrests were lawful. The court found the District of Columbia liable for the same tort on a respondeat superior theory. Pet. App. 89a-93a. And the court found the District of Columbia liable for negligent supervision "because the unlawful arrests were ordered by high level officials who knew or should have known that probable cause was lacking for these arrests." *Id.* at 96a.

b. At a trial limited to damages, a jury awarded each respondent between $35,000 and $50,000. Pet. App. 3a. Officers Parker and Campanale and the District of Columbia were made jointly liable for the $680,000 judgment. *Id.* at 121a & n.4 (Kavanaugh, J., dissenting from the denial of rehearing en banc). In addition, the court ordered Officers Parker and Campanale to pay respondents' attorney's fees, bringing the total award against the officers to about $1 million. *Id.* at 117a, 121a; D. Ct. Doc. 86 (Feb. 5, 2013); D. Ct. Doc. 106 (May 23, 2016).

3. a. A divided panel of the court of appeals affirmed. Pet. App. 1a-32a. The court observed that in order to convict a defendant of unlawful entry under D.C. Code § 22-3302 (Supp. 2008), the government must show not only that a defendant entered property without lawful authority, but also that the defendant "knew or should have known [he] had entered the house 'against the will of the lawful occupant or of the person lawfully in charge thereof.'" Pet. App. 9a (citation omitted).

Here, the court of appeals determined, officers lacked probable cause to believe that respondents knew or should have known their presence at the near-vacant Anacostia Avenue house was unlawful. Pet. App. 17a. The court emphasized that "Peaches and a guest at the scene" had stated that "Peaches had told the people inside the house that they could be there." *Id.* at 10a. The court reasoned that "in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of [respondents'] intent to enter against the will of the lawful owner." *Id.* at 11a. The court deemed irrelevant prior decisions finding circumstantial evidence sufficient to support "infer[ring]

an interloper's intent to enter against the will of the owner." *Id.* at 14a; see *id.* at 13a-15a. The court reasoned that the circumstances that the officers confronted in this case—including the condition of the near-vacant premises, the activities occurring at the party, and the partygoers' flight—could be consistent with an innocent mens rea. *Id.* at 15a-17a.

The court of appeals also denied qualified immunity under Section 1983. Pet. App. 21a-30a. The court acknowledged that respondents had identified no case that "invalidated an arrest for unlawful entry under similar circumstances." *Id.* at 22a. But the court found the law clearly established on the ground that it was settled that probable cause "requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense" and that "criminal intent is a necessary element of the offense of unlawful entry." *Id.* at 23a.[3]

b. Judge Brown dissented. Pet. App. 32a-44a. In her view, the court of appeals "essentially remove[d] most species of unlawful entry from the criminal code" by indicating that "any plausible explanation" means that "police lack probable cause to make arrests." *Id.* at 32a. That approach was mistaken, Judge Brown

---

[3] The court of appeals concluded that its Section 1983 analysis also sufficed to sustain the common-law false-arrest verdicts because "[t]he elements of a constitutional claim for false arrest are substantially identical to the elements of a common-law false arrest claim," Pet. App. 7a (citation omitted; brackets in original), and "the common-law privilege [petitioners] invoke overlaps with but is harder to establish than qualified immunity," *id.* at 30a. The court also affirmed the negligent-supervision verdict against the District of Columbia after rejecting the argument "that the negligent supervision claim must fail because the arrests were supported by probable cause." *Ibid.*

wrote, because "surrounding facts and circumstances" may furnish probable cause of a culpable mens rea. *Id.* at 38a. Judge Brown found such circumstances present in this case, where respondents' "party was taking place in a home so sparsely furnished as to be consistent with a vacant building," the partygoers' "response to the presence of police was to run and hide," and the partygoers gave "conflicting accounts about 'why' the party was being held" and "purported to rely on an invitation from a 'tenant' who was not actually present" and who herself gave conflicting and evasive statements. *Id.* at 39a. In any event, Judge Brown wrote, the officers should have been shielded from liability by qualified immunity, because no prior decision "require[d] officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims." *Id.* at 43a-44a; see *id.* at 41a-44a.

4. The court of appeals denied rehearing en banc by a 6-4 vote. Pet. App. 102a-104a.

a. Judge Pillard, who authored the court of appeals' decision, concurred in the denial of rehearing en banc, joined by Judge Edwards. Pet. App. 105a-115a. She characterized the disagreement between the majority and the dissent as turning on differing "case-specific assessment[s] of the circumstantial evidence in the record," but asserted that the evidence that the partygoers had a culpable mens rea here did not even "arguably" amount to probable cause. *Id.* at 113a, 115a.

b. Judge Kavanaugh dissented from the denial of rehearing en banc, joined by Judges Henderson, Brown, and Griffith. Pet. App. 116a-139a. The dissenters concluded that the officers had probable cause to arrest

respondents. *Id.* at 117a-118a, 122a, 138a. But they principally argued that the court's decision contravened 11 recent cases in which this Court has "repeatedly told courts of appeals that police officers may not be held liable for damages unless the officers were 'plainly incompetent' or 'knowingly violated' clearly established law." *Id.* at 116a (brackets and citation omitted).

Under the qualified-immunity principles of those decisions, Judge Kavanaugh wrote, this was "a fairly easy case." Pet. App. 136a. Surveying cases from many circuits, he found it settled that when "the actus re[u]s is complete and the sole issue is * * * mens rea," officers are not categorically required to accept the "variety of mens rea-related excuses" that suspects may proffer. *Id.* at 125a-126a. And here, the dissenters observed, "it was entirely reasonable for the officers to have doubts about the partiers' story." *Id.* at 132a. At a minimum, the dissenters concluded, qualified immunity was appropriate because prior decisions had "permit[ted] police officers to arrest a person for trespassing even when that person claim[ed] to have the right to be on the property," and "[n]o decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances." *Id.* at 136a (emphasis omitted).

SUMMARY OF ARGUMENT

Officers had probable cause to arrest respondents for unlawful entry after finding them partying after 1 a.m. in a nearly vacant house without the consent of the homeowner. And even if the officers lacked probable cause, they were entitled to qualified immunity because prior decisions supported probable cause and

no decision clearly established that probable cause was absent.

A. Under the Fourth Amendment, officers may arrest a person when they have probable cause to believe that the person committed an offense. See, *e.g.*, *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Probable cause is "not a high bar," *Kaley* v. *United States*, 134 S. Ct. 1090, 1103 (2014), and requires only a "fair probability" or "substantial chance of criminal activity," *Illinois* v. *Gates*, 462 U.S. 213, 238, 244 n.13 (1983).

Officers had probable cause to believe that respondents had committed unlawful entry. Because it is undisputed that officers had reason to believe that respondents had committed the actus reus of that crime, the only question is whether the officers had probable cause that respondents knew or should have known that their presence was contrary to the will of the homeowner.

The evidence to satisfy a mens rea requirement will generally be circumstantial. Here, abundant circumstantial evidence indicated that respondents knew or should have known that their presence was unauthorized. Respondents were present late at night in a nearly vacant house, with no putative owner, tenant, or host on the premises. The house was in disarray, with open and used condoms in view and beer and liquor cups on the floor. The home smelled strongly of marijuana, and women dressed in bras and thongs were giving lap dances. Officers could reasonably conclude that these circumstances were more consistent with trespassers knowingly or recklessly exploiting a vacant property than partygoers attending what they reasonably believed to be a lawful tenant's house party. And when partygoers scattered after officers arrived,

with one person going so far as to hide in the closet, and then gave "implausible," "conflicting," and "evasive" accounts of their presence, 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.6(f), at 449-451 (5th ed. 2012), officers could reasonably construe the partygoers' words and deeds as evidence of consciousness of guilt.

B. Even if officers lacked probable cause, they were entitled to qualified immunity under Section 1983. Under principles of qualified immunity, officers may be subject to money damages only if they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted).

It was not clearly established at the time of respondents' arrests that officers lacked probable cause for unlawful entry under the circumstances of this case. The most relevant precedent at the time of the arrests indicated that officers were entitled to infer probable cause that respondents had a culpable mental state when they found respondents in a vacant house without the homeowner's permission, in light of "the ordinary and reasonable inference that people know what they are doing when they act." *Tillman* v. *Washington Metro. Area Transit Auth.*, 695 A.2d 94, 96 (D.C. 1997). The D.C. Court of Appeals had repeatedly sustained jury verdicts against trespassers who had asserted an innocent state of mind. And courts across the country had rejected claims that officers lacked probable cause in trespassing cases where the evidence of a culpable mental state was circumstantial, and the arrestees asserted that they believed they were lawfully present. In addition, the disagreement of

judges over whether the circumstances of this case established probable cause is strong evidence that existing precedent did not dictate that respondents' arrests were unlawful. Because prior decisions had not clearly established that officers lacked probable cause, the officers were entitled to qualified immunity.

ARGUMENT

When officers responded to a report of illegal activity at a property that was supposed to be unoccupied and found respondents throwing a party with illegal drugs and strippers, the condition of the home, the conduct that officers observed, and the partygoers' flight from officers and inconsistent and dubious accounts furnished probable cause to arrest those present for unlawful entry. Even if the officers lacked probable cause, they were entitled to qualified immunity from suit under Section 1983, because it was not clearly established at the time of the arrests that probable cause was absent.

A. Officers Had Probable Cause To Arrest Respondents For Unlawful Entry

1. Under the Fourth Amendment, a person may be arrested when the police have probable cause to believe that the person committed an offense. See, *e.g.*, *Michigan* v. *DeFillippo*, 443 U.S. 31, 37 (1979); *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Probable cause is "not a high bar." *Kaley* v. *United States*, 134 S. Ct. 1090, 1103 (2014). It "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands." *Gerstein* v. *Pugh*, 420 U.S. 103, 121 (1975). Instead, it is a "practical," "fluid," "flexible," "common-sense" standard, *Illinois* v. *Gates*, 462 U.S. 213, 232, 236, 238, 239 (1983), that

"requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act," *Kaley*, 134 S. Ct. at 1103 (brackets, citations, and internal quotation marks omitted). The standard is satisfied if there exists "a fair probability," *Gates*, 462 U.S. at 238, or "substantial chance of criminal activity," *id.* at 244 n.13.

To determine whether probable cause exists, this Court "ha[s] consistently looked to the totality of the circumstances." *Florida* v. *Harris*, 133 S. Ct. 1050, 1055 (2013). Under the totality-of-the-circumstances approach, observations that are "readily susceptible to an innocent explanation" may nevertheless support an inference of criminal behavior when viewed alongside other evidence. *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002) (explaining the totality-of-the-circumstances approach in the context of reasonable suspicion); see *Gates*, 462 U.S. at 243-246. "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest," but because the analysis is objective, "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Devenpeck* v. *Alford*, 543 U.S. 146, 152-153 (2004). And under what is generally known as the collective-knowledge doctrine, in cases "where law enforcement authorities are cooperating in an investigation, * * * the knowledge of one is presumed shared by all." *Illinois* v. *Andreas*, 463 U.S. 765, 771 n.5 (1983).

2. a. When respondents were found holding a party after 1 a.m. at a home that was supposed to be vacant, without the permission of the property's owner, police had probable cause to conclude that they had commit-

ted unlawful entry. The misdemeanor offense of unlawful entry requires that a person have (1) "'entered, or attempted to enter,' a private dwelling or part thereof"; (2) "voluntarily, on purpose, and not by mistake or accident"; (3) "without lawful authority"; (4) "'against the will' of 'the person lawfully in charge of the premises'"; and (5) that the person "'knew or should have known that s/he was entering against that person's will.'" *Ortberg* v. *United States*, 81 A.3d 303, 309 (D.C. 2013) (emphases omitted) (quoting Criminal Jury Instructions for the District of Columbia, No. 5.401 (5th ed. 2009)).[4] Here, there is no question that respondents committed the actus reus of unlawful entry when they held a party in a home without the authorization of a person lawfully in charge of the premises. Respondents dispute instead whether police had probable cause that they knew or should have known their presence was contrary to the will of the person lawfully in charge of the home, as required to satisfy the statute's mens rea.

A suspect's mental state will "almost always be proved" by circumstantial evidence, *United States* v. *Santos*, 553 U.S. 507, 521 (2008) (plurality opinion) (discussing mens rea of knowledge), because "it is so unlikely that direct evidence will be available," 2A Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 411, at 119 (4th ed. 2009). Here, substantial circumstantial evidence supported

---

[4] *Ortberg* postdates the events in this case and involved the version of the unlawful-entry statute that was in effect in 2011, but the court described its holding regarding the elements of unlawful entry as a synthesis of several decades of case law. 81 A.3d at 306-309 & n.3.

the inference that respondents knew or should have known their presence was unauthorized.

Respondents were present late at night at a house that did not belong to any of them—with no putative owner, tenant, or host even present in the building. The condition of the property suggested that opportunists were exploiting a vacant space, not that a lawful tenant was hosting a party. The level of furnishing was consistent with a vacant home, and the premises were in "disarray," J.A. 112, with open condoms in view and liquor and beer cups left on the floor. Officers could reasonably conclude that these conditions were more consistent with trespassers knowingly or recklessly taking advantage of a vacant property than partygoers attending what they reasonably believed to be a legitimate house party.

The activities occurring at the near-vacant property provided additional support for an inference of culpable mens rea. Officers had been called to investigate a neighbor's report of illegal activities on the premises, and once they arrived they smelled a strong odor of marijuana, observed women giving lap dances, and found a naked woman and several men on the upstairs floor that contained the lone mattress. The illegal drug use and conduct "consist[e]nt with activity being conducted in strip clubs for profit," J.A. 112, provided additional reason for officers to conclude that partygoers likely realized—or should have realized—that the party had not been authorized by the home's absent owner.

Partygoers gave more direct evidence of a culpable mental state when they scattered as officers arrived, with one person going so far as to hide in the closet. J.A. 143, 177. As this Court has explained, "deliber-

ately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*," because they are evidence of consciousness of guilt. *Sibron* v. *New York*, 392 U.S. 40, 66 (1968); see *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) (describing "[h]eadlong flight" as "the consummate act of evasion," which while "not necessarily indicative of wrongdoing, * * * is certainly suggestive of such"). The panicked reaction of partygoers when police arrived thus furnished additional evidence that any invitation the partygoers had received did not lead them to believe that their presence was authorized by any lawful owner or tenant. See 2 LaFave § 3.6(e), at 445-446 & n.202 (collecting cases holding that "if two or more individuals are jointly engaged in suspicious activity and one of the group flees upon seeing the police, this also may be considered as bearing upon the question of whether there is probable cause as to the non-fleeing companions").

Officers' conversations with the 21 people at the party cast additional doubt on an innocent mens rea. When the officers interviewed partygoers, not a single person could even identify the homeowner, and while several partygoers claimed they had been invited by a person known as Peaches, most could not "say who gave them permission to be in the house" at all, Pet. App. 56a (citation omitted); see J.A. 131-132—strongly suggesting that no one had given them such permission.

When officers probed further, partygoers offered the kinds of "conflicting" and "inconsistent" accounts, Pet. App. 10a, that suggest a culpable mens rea, see 2 LaFave § 3.6(f), at 449-451 & nn.214-216 (collecting cases holding that "implausible," "conflicting," or "eva-

sive" accounts "may well constitute probable cause when considered together with * * * prior suspicions"). Some of those present asserted they were there for a bachelor party, but others asserted they were there for a birthday party, and no partygoer identified the purported guest of honor. Officers could reasonably infer under these circumstances that the partygoers were providing a cover story that was not true. And this Court has long recognized that false statements can not only provide reason to doubt a person's account, but can also provide affirmative evidence of consciousness of wrongdoing. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *Wright* v. *West*, 505 U.S. 277, 296 (1992) (plurality opinion); *Wilson* v. *United States*, 162 U.S. 613, 621 (1896).

b. The panel majority appeared to reason that once several partygoers told officers that Peaches had invited them to the near-vacant home, and a person identifying herself as Peaches provided a similar account, officers were required to credit those accounts as "uncontroverted" and to conclude that partygoers had an innocent mental state as a result. Pet. App. 10a; see *id.* at 9a-10a. That analysis is mistaken on several fronts. First, the accounts of Peaches and several of the partygoers did not provide "uncontroverted" evidence of an innocent mens rea, *id.* at 10a, because, as set forth above, abundant circumstantial evidence suggested that respondents knew or should have known that their presence was contrary to the will of the home's lawful owner. Officers making on-the-spot arrest decisions are not required to credit, in determining probable cause, the exculpatory accounts that jurors would be free to discredit in applying the

more stringent beyond-a-reasonable-doubt standard at trial. See *id.* at 127a-130a (Kavanaugh, J., dissenting from the denial of rehearing en banc) (collecting cases); see also *id.* at 105a (Pillard, J., concurring in the denial of rehearing en banc) (acknowledging that officers faced with claims of an innocent mens rea need not "ignore other[] circumstantial evidence of culpability" or credit accounts that are "implausible").

The account of Peaches, moreover, was especially unworthy of belief, because Peaches was evasive, lied to officers, and refused to come to the house to speak to the officers in person—before hanging up the phone and cutting off contact with officers altogether. Pet. App. 5a, 50a.

Further, even if the version of events provided by Peaches were fully credited, officers could still have inferred that partygoers knew or should have known that their presence was unauthorized in view of the condition of the premises, the conduct occurring there, the partygoers' flight, and the implausible and inconsistent accounts given by those at the party.

c. The panel below alternatively suggested that, even setting aside Peaches' account and the exculpatory statements of partygoers, not enough evidence existed to provide probable cause that partygoers knew or should have known they were not authorized to be on the premises. In reaching that conclusion, however, the court relied on a "divide-and-conquer analysis" that "departs sharply" from this Court's guidance concerning totality-of-the-circumstances analysis. *Arvizu*, 534 U.S. at 274 (explaining that a divide-and-conquer approach is inconsistent with totality-of-the-circumstances analysis, in the context of a reasonable-suspicion-based stop); see *Harris*, 133 S. Ct. at 1055

(reaffirming that probable-cause determinations are made based on the totality of the circumstances). The court examined circumstances suggesting a culpable mens rea on which petitioners relied, discarding them in turn because it found each insufficient to establish probable cause when considered separately. It brushed aside the virtually vacant condition of the house in which respondents were found after 1 a.m. because it concluded that condition was "*on its own*" inadequately probative, and it discounted the partygoers' scattering once they saw police as not "sufficient *standing alone* to create probable cause." Pet. App. 16a (emphases added). That "evaluation and rejection" of evidence by considering factors "in isolation from each other" is inconsistent with analysis premised on "the 'totality of the circumstances,' as [this Court's] cases have understood that phrase." *Arvizu*, 534 U.S. at 274.

The panel similarly erred in dismissing circumstantial evidence that respondents knew or should have known their presence was unauthorized on the ground that the evidence could have an innocuous explanation. The court declined to draw any inference from the illegal drugs at the party, suggesting that officers who smelled a strong odor of marijuana could have been mistaken because the officers "did not *see* any evidence of drugs." Pet. App. 16a n.5 (emphasis added). It declined to find relevant the near-vacant condition of the home, reasoning that the "sparse furnishings" could be consistent with a tenant's hosting a party just before moving in. *Id.* at 16a-17a. And it suggested that the strip-club-like activity was not probative because homeowners could have agreed to host a bachelor party involving such activity in their home. *Id.* at 15a-16a. That approach was contrary to this

Court's decisions. The Court has held that "[i]nnocent behavior frequently will provide the basis for a showing of probable cause." *Gates*, 462 U.S. at 244 n.13; see *id.* at 243-246. It has likewise rejected the proposition that conduct is irrelevant under a totality-of-the-circumstances framework simply because it is "susceptible to an innocent explanation." *Arvizu*, 534 U.S. at 274.

d. The court of appeals' unduly stringent approach to mens rea would undermine the "fair leeway for enforcing the law in the community's protection" that the probable-cause standard embodies. *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). As an initial matter, the panel's approach would make it exceedingly difficult to make arrests and begin the adjudicatory process in trespassing cases. If circumstantial evidence is insufficient for probable cause in a case in which the premises were virtually vacant and in disarray, illegal activity was occurring on the premises, partygoers fled and hid when police arrived, and those present gave inconsistent and implausible accounts, then it will be the rare case where officers will have sufficient evidence to arrest for trespass at a private home in the absence of a confession or evidence of an additional crime such as burglary. The majority below all but acknowledged this point: In response to petitioners' observation that the court's approach would make it nearly impossible to enforce the unlawful-entry statute at many types of properties, the panel responded only that officers could still ask trespassers to leave—and make arrests if the exact same trespassers later returned. Pet. App. 17a.

The court of appeals' approach to mens rea would have ramifications beyond trespassing statutes. Mens

rea requirements, such as those contained in the unlawful-entry statute, are the "general rule" in criminal law. *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015) (citation omitted). And as Judge Kavanaugh observed in his dissent below, "officers often hear a variety of mens rea-related excuses" when "people appear to be engaged in unlawful activity": "'The drugs in my locker aren't mine.' 'I don't know how the loaded gun got under my seat.' 'I didn't realize the under-aged high school kids in my basement had a keg.' 'I wasn't looking at child pornography on my computer, I was hacked.' 'I don't know how the stolen money got in my trunk.' 'I didn't see the red light.' 'I punched my girlfriend in self-defense.'" Pet. App. 126a. A decision that requires officers to give substantial weight to exculpatory accounts at the probable-cause stage or that adopts a stringent, piecemeal approach to circumstantial evidence of mens rea at the time of arrest would jeopardize the ability of law enforcement agents, prosecutors, and grand juries to begin the adjudicatory process across the entire spectrum of cases involving mens rea elements. And such a decision would have ramifications for pre-arrest investigations as well, because probable cause is also the showing necessary to obtain a search warrant in a criminal investigation.

B. At A Minimum, The Officers Were Entitled To Qualified Immunity

Even if officers lacked probable cause to arrest respondents, they were entitled to qualified immunity under Section 1983, because they did not violate clearly established law.

1. Section 1983, which provides a cause of action against state and local officials for the deprivation of

constitutional rights under color of law, incorporates common-law principles of official immunity. See *Filarsky* v. *Delia*, 566 U.S. 377, 383-384 (2012); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982). The same common-law immunity principles apply in actions against federal officials for violations of constitutional rights under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Under the doctrine of qualified immunity, government officials may not be subject to civil monetary damages for their acts unless they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citations omitted). A clearly established right, this Court has explained, "is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Ibid.* (citation omitted). The doctrine thus "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) (citations and internal quotation marks omitted). In so doing, qualified immunity serves the public interest by ensuring that "fear of personal monetary liability and harassing litigation" will not "unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987); see *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985).

The first step of qualified-immunity analysis is to define the right at issue "at the appropriate level of specificity." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). This Court has repeatedly cautioned "that 'clearly es-

tablished law' should not be defined 'at a high level of generality.'" *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011)). Framed "as a broad general proposition" —for instance, the right to be free from unreasonable searches and seizures—any constitutional right would be clearly established. *Reichle* v. *Howards*, 566 U.S. 658, 665 (2012) (citation omitted). Instead, a right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Ibid.* (citation omitted). This Court has instructed that "specificity is especially important in the Fourth Amendment context"—an area involving highly case-specific determinations in which "it is sometimes difficult for an officer to determine how the relevant legal doctrine * * * will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. at 308 (brackets and citation omitted).

After defining the right at issue at an appropriate level of specificity, a court must next ask whether "every reasonable official would have understood that what he is doing violates" that particularized right. *Reichle*, 566 U.S. at 664 (citations, brackets, and internal quotation marks omitted). In this analysis, although "the very action in question" need not "have previously been held unlawful," *Safford Unified Sch. Dist. #1* v. *Redding*, 557 U.S. 364, 377 (2009) (brackets and citation omitted), "existing precedent must have placed the * * * constitutional question beyond debate," *Reichle*, 566 U.S. at 664 (citation omitted).

2. a. Officers were entitled to qualified immunity because, at a minimum, it was not clearly established when officers arrested respondents that doing so violated respondents' Fourth Amendment rights. Whether an

arrest comports with the Fourth Amendment depends on whether, under the totality of the circumstances known to officers, there existed probable cause that the arrestee was committing a crime. See, *e.g.*, *Beck*, 379 U.S. at 91. Accordingly, to determine whether it was clearly established that an arrest violated the Fourth Amendment, a court must determine whether it was clearly established that the facts and circumstances known to officers did not constitute probable cause. See *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (explaining in the context of a *Bivens* suit for false arrest in violation of the Fourth Amendment that qualified immunity depended on whether "a reasonable officer could have believed that probable cause existed to arrest" in light of "the facts and circumstances within [officers'] knowledge") (citation omitted).

Particularized to "the facts and circumstances" known to police officers at the time of respondents' arrests, the question in this case is whether it was clearly established that officers lacked probable cause that a group of people "having a party late at night with strippers and drugs" in a "house that none of the partiers owned or rented," had committed unlawful entry, when the homeowner confirmed that the party was unauthorized, the premises were in disarray and furnished in a manner consistent with a vacant house, and partygoers scattered when officers arrived and gave inconsistent and implausible accounts—but several partygoers claimed "permission from a woman named Peaches to use the house." Pet. App. 119a, 125a (Kavanaugh, J., dissenting from the denial of rehearing en banc).

It was not clearly established that officers lacked probable cause for unlawful entry under these circumstances, so that "every reasonable official" would have understood that arresting respondents violated the Fourth Amendment. *Reichle*, 566 U.S. at 664 (citations and internal quotation marks omitted). Neither respondents nor the panel below identified any decision finding that officers lacked probable cause of unlawful entry under remotely similar facts. See Pet. App. 22a; *id.* at 136a (Kavanaugh, J., dissenting from the denial of rehearing en banc). Nor had any decision held, more generally, that officers were required to credit claims of an innocent mens rea in assessing probable cause. *Id.* at 136a (Kavanaugh, J., dissenting from the denial of rehearing en banc).

Instead, the most on-point case law supported officers' decision to arrest. *Tillman* v. *Washington Metropolitan Area Transit Authority*, 695 A.2d 94 (D.C. 1997), strongly suggested that officers who found a defendant unlawfully present at a location were generally permitted to find probable cause that the defendant had a culpable mens rea based on the defendant's commission of the actus reus. *Id.* at 96. That decision rejected the Section 1983 claims of a person arrested for violating a law that prohibited "knowingly" entering "the paid area" of a Metro station without paying a fare. *Ibid.* (quoting D.C. Code § 44-224 (Supp. 1990)). The court declined to accept the plaintiff's argument that officers lacked probable cause because they "had no reason to believe that [the plaintiff] was 'knowingly' in the paid area," concluding instead that "[t]he officers reasonably could have inferred from [the plaintiff's] undisputed conduct that he had the intent required." *Ibid.* More broadly, the

court explained: "We think it would be an unusual case where the circumstances, while undoubtedly proving an unlawful act, nonetheless demonstrated so clearly that the suspect lacked the required intent that the police would not even have probable cause for an arrest," in light of "the ordinary and reasonable inference that people know what they are doing when they act." *Ibid.* (citing cases involving filing a false tax return, fare evasion, entering building with intent to steal, and shoplifting). That principle has obvious application here.

Cases under the unlawful-entry provision at issue in this case afforded additional reason to conclude that there was probable cause to arrest respondents. As Judge Kavanaugh observed in his dissent (Pet. App. 134a-136a), the D.C. Court of Appeals had repeatedly affirmed unlawful-entry convictions of defendants who offered innocent excuses for their presence. See *Artisst* v. *United States*, 554 A.2d 327, 329 (1989) (defendant claiming to have entered a dormitory to buy soccer equipment from a resident); *McGloin* v. *United States*, 232 A.2d 90, 90-91 (1967) (defendant claiming to have entered an apartment building in search of a friend or a lost cat); see also Pet. Br. 46 (citing additional cases). By confirming that claims of innocent mens rea may be discounted when determining guilt beyond a reasonable doubt, these decisions established *a fortiori* that officers need not credit such claims when determining probable cause.

Moreover, the decisions of the D.C. Court of Appeals were consistent with cases of "[a]lmost every court of appeals" holding that officers need not "definitively resolve difficult mens rea questions in the few moments in which officers have to decide whether to

make an arrest." Pet. App. 127a (Kavanaugh, J., dissenting from the denial of rehearing en banc) (emphasis omitted); see *id.* at 127a-130a (collecting cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits). Applying that principle, courts across the country have found that officers acted properly in arresting individuals for trespassing, even when the arrestees offered innocent explanations to officers on the scene.[5]

---

[5] See *Finigan* v. *Marshall*, 574 F.3d 57, 59 (2d Cir. 2009) (rejecting false-arrest claim of member of divorcing couple arrested at her former home, although the woman had told the arresting officer that she shared legal title to the premises); *Wright* v. *City of Philadelphia*, 409 F.3d 595, 597, 603 (3d Cir. 2005) (concluding that officers had probable cause to arrest a woman for trespassing, even though she had apparently reentered a property where she was sexually assaulted to retrieve personal belongings and evidence, because while officers "may have made a mistake" when they "did not believe [the woman's] explanation for her entry," the probable-cause "standard does not require that officers correctly resolve conflicting evidence" or accurately assess credibility); *Hutton* v. *Strickland*, 919 F.2d 1531, 1540-1541 (11th Cir. 1990) (rejecting Section 1983 claim of couple arrested for trespassing even though the arrestees asserted that "they lacked the willful intent to commit an unlawful act" on the ground that "the obvious presence of the elements evidencing the commission of misdemeanor trespass warranted the arrest"); *Bodzin* v. *City of Dallas*, 768 F.2d 722, 723-726 (5th Cir. 1985) (rejecting false-arrest claim of plaintiff arrested for trespassing who had asserted that he was on public property); *Anderson* v. *DeCristofalo*, 494 F.2d 321, 322-323 (2d Cir. 1974) (per curiam) (rejecting Section 1983 claims of plaintiffs arrested for trespassing even though the plaintiffs had asserted they were lawfully present in an apartment); *State* v. *Newcomb*, 20 A.3d 881, 884-885 (N.H. 2011) (concluding that officers had probable cause to arrest a defendant who claimed he was leaving a U-Haul truck on his aunt's property, because circumstantial evidence suggested defendant "knew he was not

In sum, at the time that respondents were arrested, no case suggested that officers lacked probable cause for unlawful entry when an arrestee offered an innocent explanation but there was circumstantial evidence of a culpable mens rea, and many decisions supported a contrary conclusion.

Finally, the disagreement among judges on probable cause in this case confirms that this was not a situation in which any reasonable officer would have found probable cause lacking. Four out of the 11 judges considering this case at the district court and court of appeals stages found that officers *did* have probable cause to arrest respondents. When judges themselves disagree, this Court has long recognized that it is generally "unfair to subject police to money damages for picking the losing side of the controversy." *Layne*, 526 U.S. at 618; see *al-Kidd*, 563 U.S. at 743.

b. In denying qualified immunity notwithstanding the state of the law and the disagreement among judges, the court below deviated from this Court's framework for qualified-immunity decisions. Although this Court has explained that the "clearly established law" against which officers' conduct is measured for purposes of qualified immunity must be "'particularized'

---

allowed on the premises"); see also *Borgman* v. *Kedley*, 646 F.3d 518, 524 (8th Cir. 2011) (explaining in a case involving a trespassing arrest that "[i]t is usually not possible for an officer to be certain about a suspect's state of mind at the time of a criminal act" and that officer "need not rely on an explanation given by the suspect"); *Paff* v. *Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000) (stating in a case involving a trespassing arrest that "[a]bsent a confession, the officer considering the probable cause issue in the context of crime requiring a mens rea on the part of the suspect will always be required to rely on circumstantial evidence regarding the state of his or her mind").

to the facts of the case," the court of appeals measured petitioners' conduct against the principle, "at a high level of generality," *Pauly*, 137 S. Ct. at 552 (citations omitted), "that probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense that the officers believe supports arrest, including any state-of-mind element," Pet. App. 23a. That broad principle cannot establish that only the "plainly incompetent or those who knowingly violate the law" would have thought respondents' arrests lawful, *Carman*, 135 S. Ct. at 350 (citations omitted), because it does not resolve whether the facts of this case provided "some evidence" supporting each of the elements of unlawful entry, Pet. App. 23a; see *Mullenix*, 136 S. Ct. at 308 (emphasizing the need for "specificity" in determining qualified immunity under the Fourth Amendment because "it is sometimes difficult for an officer to determine how the relevant legal doctrine * * * will apply to the factual situation the officer confronts") (brackets and citation omitted); see also *Bryant*, 502 U.S. at 228 (concluding that officers were entitled to qualified immunity for arrests if they could reasonably have believed probable cause existed in light of the "facts and circumstances within their knowledge") (citation omitted).

The panel alternatively asserted that it was obvious that the circumstantial evidence of a culpable mens rea in this case was inadequate, even in the absence of any decision reaching that conclusion on similar facts —invoking the principle that officials can sometimes be "on notice that their conduct violates established law even in novel factual circumstances." Pet. App. 23a (quoting *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002));

see *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (stating that "in an obvious case" Fourth Amendment principles "at a high level of generality" "can 'clearly establish' the answer, even without a body of relevant case law"). But a case involving evidence long recognized as supporting an inference of culpable mens rea, see, *e.g.*, *Sibron*, 392 U.S. at 66 (flight); *Tillman*, 695 A.2d at 96 (unlawful presence); 2 LaFave § 3.6(f), at 449-451 (implausible or inconsistent accounts), where the closest precedents supported a finding of probable cause and judges sharply disagreed over the ultimate probable-cause determination, is not a case in which general principles alone made it obvious that probable cause was lacking.

Nor is it consistent with the objectives of qualified immunity to impose personal liability because judges conclude, after the fact, that the evidence fell short in light of a "case-specific assessment of the circumstantial evidence in the record"—even though no case had previously reached such a holding on similar facts. Pet. App. 113a (Pillard, J., concurring in the denial of rehearing en banc). Officers must routinely determine on the spot whether a novel set of facts established probable cause for an offense with a mens rea requirement. See *id.* at 126a (Kavanaugh, J., dissenting from the denial of rehearing en banc) (offering examples involving guns, drugs, child pornography, theft, assault, and other crimes). If million-dollar personal liability judgments could rest on a court's after-the-fact conclusion that particular circumstantial evidence did not add up to sufficient proof of mens rea, officers would likely be chilled from making even legitimate arrests. A central purpose of qualified im-

munity is to prevent that result. See, *e.g.*, *Forsyth*, 472 U.S. at 525-526.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
DOUGLAS N. LETTER
BARBARA L. HERWIG
H. THOMAS BYRON III
DANA KAERSVANG
Attorneys

MAY 2017

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUL 19 2017
OFFICE OF THE CLERK

No. 15-1485

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

THEODORE WESBY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CECILLIA D. WANG
EZEKIEL R. EDWARDS
American Civil Liberties Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ANDREW J. PINCUS
COUNSEL OF RECORD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

ARTHUR B. SPITZER
SCOTT MICHELMAN
American Civil Liberties Union of the District of Columbia
4301 Connecticut Avenue, NW Suite 434
Washington, DC 20008
(202) 457-0800

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of the *Amici Curiae* 1

Summary of Argument 1

Argument 5

Petitioners Were Properly Held Responsible for Violating the Fourth Amendment. 5

A. The Fourth Amendment's Protections Against Abuse Of Government Power Were Critical To The Founding Generation And Remain Fundamental Today 5

B. The Probable Cause Standard Requires Reasonably Trustworthy Facts Satisfying Each Element Of The Criminal Offense. 12

C. The Individual Petitioners Are Not Immune From Damages Liability 15

1. Current Qualified Immunity Doctrine Has No Basis In Congress's Enactment Of Section 1983. 16

a. The Framers of the Fourth Amendment envisioned broad monetary liability for officers who committed unconstitutional acts. 16

b. The common law in 1871 did not provide a general immunity defense for executive officers, but only specific defenses to certain tort claims. 19

TABLE OF CONTENTS—continued

Page

c. Current qualified immunity jurisprudence bears no resemblance to the defenses available to executive officers at common law—and produces much more expansive immunity. 22

d. There are strong reasons for the Court to reconsider its qualified immunity jurisprudence in an appropriate case. 23

2. The lower courts properly rejected respondents' immunity claim. 29

Conclusion 30

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. *Creighton*,
483 U.S. 635 (1987) 4, 22

Atwater v. *City of Lago Vista*,
532 U.S. 318 (2001) 13

Beck v. *Ohio*,
379 U.S. 89 (1964) 12, 13

Brinegar v. *United States*,
338 U.S. 160 (1949) 12, 31

Briscoe v. *LaHue*,
460 U.S. 325 (1983) 17

Buckley v. *Fitzsimmons*,
509 U.S. 259 (1993) 17

Elonis v. *United States*,
135 S. Ct. 2001 (2015) 14

Entick v. *Carrington*,
95 Eng. Rep. 807 (1765) 6, 8

Filarsky v. *Delia*,
566 U.S. 377 (2012) 20

Floyd v. *City of New York*,
959 F. Supp. 2d 540 (S.D.N.Y 2013) 29

Griffin v. *Wilcox*,
21 Ind. 370 (1863) 22

Harlow v. *Fitzgerald*,
457 U.S. 800 (1982) ..... *passim*

Heien v. *North Carolina*,
135 S. Ct. 530 (2014) 31

TABLE OF AUTHORITIES—continued

Page(s)

Hope v. *Pelzer*,
536 U.S. 730 (2002) 31

Huckle v. *Money*,
95 Eng. Rep. 768 (1763) 7

Imbler v. *Pachtman*,
424 U.S. 409 (1976) 16

Little v. *Barreme*,
6 U.S. (2 Cranch) 170 (1804) 18

Malley v. *Briggs*,
475 U.S. 335 (1986) 16

The Marianna Flora,
24 U.S. 1 (1825) 21

Maryland v. *King*,
133 S. Ct. 1958 (2013) 8, 9, 10

Michigan v. *DeFillippo*,
431 U.S. 31 (1979) 2, 12, 13

Milligan v. *Hovey*,
17 F. Cas. 380 (C.C.D. Ind. 1871) 21

Mitchell v. *Harmony*,
54 U.S. (13 How.) 115 (1851) 19

Money v. *Leach*,
97 Eng. Rep. 1075 (1765) 7

Morissette v. *United States*,
342 U.S. 246 (1952) 14

Myers v. *Anderson*,
238 U.S. 368 (1915) 22

Osborn v. *Haley*,
549 U.S. 225 (2007) 30

TABLE OF AUTHORITIES—continued

Page(s)

Pierson v. *Ray*,
386 U.S. 547 (1967) 17, 21

Riley v. *California*,
134 S. Ct. 2473 (2014) 6

Rosemond v. *United States*,
134 S. Ct. 1240 (2014) 14

Samuel v. *Payne*,
99 Eng. Rep. 230 (1780) 10

Tracy v. *Swartwout*,
35 U.S. 80 (1836) 19

United States v. *Chadwick*,
433 U.S. 1 (1977) 6

United States v. *O'Brien*,
560 U.S. 218 (2010) 14

Wasson v. *Mitchell*,
18 Iowa 153 (1864) 20, 21

Wilkes v. *Wood*,
98 Eng. Rep. 489 (1763) 6, 7

Wise v. *Withers*,
7 U.S. (3 Cranch) 331 (1806) 19

Wyatt v. *Cole*,
504 U.S. 158 (1992) 3, 15

Ziglar v. *Abbasi*,
137 S. Ct. 1843 (2017) ..... *passim*

Statutes, Rules and Regulations

42 U.S.C. § 1983 ..... *passim*

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

1 *Annals of Cong.* (1789) (Joseph Gales ed., 1834) 10

Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53 (1996) 6, 10

Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994) 27

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) 18

D.C. Police Complaints Board, *Report and Recommendations: Warrantless Entries into Private Homes by MPD Officers* (June 12, 2013) 29

Essays by a Famer (I) (Feb. 15, 1788), *reprinted in* 5 *The Complete Anti-Federalist* (Herbert J. Storing ed., 1981) 27

David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1 (1972) 17, 18

James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862 (2010) 17, 19, 20

TABLE OF AUTHORITIES—continued

Page(s)

Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014) 24, 25

John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013) 17

Joseph Story, *Commentaries on the Constitution of the United States* § 1895 (1833) 8, 9

M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905 (2010) 7

Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 Minn. L. Rev. 585 (1927) 22

Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (And Maybe Some of Them, Too)*, 45 J. Marshall L. Rev. 1023 (2012) 25

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999) 10, 11, 21

U.S. Dep't of Justice, *Investigation of the Chicago Police Department* (Jan. 13, 2017) 29

TABLE OF AUTHORITIES—continued

Page(s)

U.S. Dep't of Justice, *Investigation of the Cleveland Division of Police* (Dec. 4, 2014) 29

William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. (forthcoming 2018) ..... *passim*

William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (2009) 8, 9

INTEREST OF THE *AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil rights laws. Since its founding in 1920, the American Civil Liberties Union has appeared in numerous cases before this Court, both as counsel representing parties and as *amicus curiae*.

The American Civil Liberties Union of the District of Columbia, an affiliate of the national ACLU, is devoted to advocacy on behalf of more than 20,000 District members and supporters. This brief refers to *amici* collectively as "the ACLU."

This case presents two issues of particular importance to the ACLU: first, vindicating the Fourth Amendment's protections of individuals' liberty and privacy; and, second, ensuring that federal courts—through the remedy provided by 42 U.S.C. § 1983—are able to provide an effective means of redress for persons harmed by violations of their constitutional rights.[1]

SUMMARY OF ARGUMENT

The constitutional protections at issue in this case were critical to the Founding generation. Searches and arrests by the British without sufficient particularized suspicion—under the authority

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

of general warrants and writs of assistance—were a key reason for our Revolution. Americans saw firsthand how unchecked power could be abused to punish enemies, to single out unpopular persons or causes, or simply to serve a government official's personal ends.

Indeed, the 1787 Constitution was criticized because it did not prohibit such intrusions on liberty and privacy. The Fourth Amendment was adopted to address that deficiency and to codify the principle that individualized suspicion is essential to establish the lawfulness of an arrest or a search.

The dramatic expansion of government at all levels since the Framers' time has only increased the importance of this protection. With much broader authority and many more government officials exercising it, the ability of government to reach into individuals' lives is greater than ever before. Ensuring that the Fourth Amendment fulfills its role as an effective bulwark against unreasonable government intrusions on liberty and privacy is therefore especially important today.

The probable cause standard is the Amendment's key protection against unjustified government intrusions. The Court has long held that "'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan* v. *DeFillippo*, 431 U.S. 31, 37 (1979).

That standard requires a comparison between the reasonably trustworthy facts known to the officer

and the elements of the offense. If a prudent person would not conclude that those facts satisfy all of the elements, then an arrest is not permissible.

Petitioners' argument that an officer may ignore some elements of the offense—including *mens rea* when it is a requirement—makes no sense. A criminal offense is composed of *all* of its elements. And, as this Court has repeatedly observed, *mens rea* in particular plays a critical role in separating unlawful from lawful actions. Allowing an officer to arrest someone without facts sufficient to believe that the individual acted with the requisite *mens rea* would allow officers to intrude on individuals' liberty without the particularized justification that the Fourth Amendment requires. Because the probable cause standard is not satisfied here, the courts below properly concluded that the arrests were unconstitutional.

Moreover, the individual petitioners are not entitled to qualified immunity. Three Justices have raised serious questions about the Court's current qualified immunity jurisprudence. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871-1872 (2017) (Thomas, J., concurring opinion); *Wyatt* v. *Cole*, 504 U.S. 158, 171-172 (1992) (Kennedy, J., joined by Scalia, J., concurring). Although the Court initially justified the recognition of qualified immunity by reference to the common law backdrop against which Congress enacted Section 1983, the current immunity standard diverges sharply from the principles courts applied in 1871, and creates a very different, and much more expansive, immunity from damages liability.

Awarding qualified immunity here would further limit availability of the Section 1983 remedy, moving the Court's qualified immunity standard even far-

ther from the background legal principles that applied in 1871. That would conflict with Congress's intent in enacting Section 1983, seriously undermining injured individuals' ability to obtain redress for constitutional violations and to hold government officers accountable for their unconstitutional actions. A qualified immunity ruling in the officers' favor here would also deviate from the intent of the Framers of the Fourth Amendment

When the Fourth Amendment was adopted, executive officers were strictly liable for harm resulting from unconstitutional acts. Such damages actions were a staple of litigation—indeed, they were the means by which individuals vindicated their Fourth Amendment rights. The resulting burden on government officers was ameliorated by the availability of indemnification.

The same general principle prevailed in 1871, when Section 1983 was enacted. Courts had begun to recognize tailored exemptions from liability in particular contexts, or to modify liability standards to protect government officials. But there was no generally-accepted, across-the-board immunity principle that applied to every executive official who violated the Constitution.

The current qualified immunity standard asks whether the government official violated "clearly established" law such that the unlawfulness of his or her actions was "apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). The official's subjective good faith is irrelevant—even though subjective good faith was a critical element of the common law precedents on which the Court's initial qualified immunity standard was based. Thus, an officer who acts with subjective bad faith and in violation of the

Fourth Amendment may escape liability merely because there are no clear precedents applying the law to the particular facts of the case. This is not consistent with Congress's purpose in enacting Section 1983 or the Framers' intent to protect the people from unreasonable searches and seizures.

For these reasons, the Court in an appropriate case should reconsider its qualified immunity jurisprudence.

Here, the lower courts faithfully applied the Court's current immunity precedents to conclude that the individual petitioners are not entitled to immunity. Given the very significant questions regarding the correctness of that current standard, the Court in this case should not further expand the availability of immunity—which would move even farther away from the Framers' purpose of protecting against unreasonable searches and seizures and from the principles known to the Congress that enacted Section 1983.

ARGUMENT

PETITIONERS WERE PROPERLY HELD RESPONSIBLE FOR VIOLATING THE FOURTH AMENDMENT.

A. The Fourth Amendment's Protections Against Abuse Of Government Power Were Critical To The Founding Generation And Remain Fundamental Today.

This Court has repeatedly recognized Americans' hatred of the unjustified intrusions on privacy and liberty that resulted from the British use of general warrants and writs of assistance to conduct searches and make arrests without any individualized suspi-

cion. The colonists' opposition to these measures "was in fact one of the driving forces behind the Revolution itself." *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014).

Because the Fourth Amendment "grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England," *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977), that history is highly relevant in interpreting the Amendment and configuring the remedies available when Fourth Amendment rights are violated—the issues before the Court in this case.

The history shows that the Founding generation viewed particularized facts—which became "probable cause" in today's parlance—as an essential prerequisite both searches and arrests. That requirement effectively precluded the use of general warrants and writs of assistance, which were resented because they permitted searches and arrests without any reason to believe that the individuals targeted had engaged in criminal activity. The history further demonstrates that the Framers viewed juries as an essential protection against government overreaching, with damages actions the principal mechanism for vindicating Fourth Amendment rights.

The Founding generation's aversion to general warrants was rooted in the celebrated *Wilkes* and *Entick* cases,[2] described by one legal historian as "the most famous colonial-era cases in all America—the O.J. Simpson and Rodney King cases of their

---

[2] *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (1763); *Entick* v. *Carrington*, 95 Eng. Rep. 807 (1765).

day." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 65 (1996).

Wilkes involved a broad warrant that was issued by the Secretary of State without probable cause under oath and that authorized both arrests and searches of the homes and private papers of 49 individuals potentially responsible for publication of *The North Briton No. 45*, which criticizing the King. Government agents "ransacked houses and printing shops in their searches, arrested forty-nine persons (including the pamphlet's author, Parliament member John Wilkes), and seized incriminating papers—all under a single general warrant." M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905, 910 (2010).

Several of the individuals targeted brought tort actions against those executing the warrant seeking damages in trespass for the searches, seizure of papers, and arrests. *E.g.*, *Wilkes*, 98 Eng. Rep. at 491-492. The courts held that the general warrant did not provide a defense against liability, because such warrants were "illegal, and contrary to the fundamental principles of the constitution." 98 Eng. Rep. at 499; see also *Money* v. *Leach*, 97 Eng. Rep. 1075, 1088 (1765); *Huckle* v. *Money*, 95 Eng. Rep. 768, 769 (1763).

Another general warrant targeted the publisher of an allegedly seditious pamphlet. In the suit by the publisher seeking damages in trespass for harm resulting from the search and arrest, the court rejected the defendants' reliance on the general warrant: "we can safely say there is no law in this country to justify the defendants in what they have done; if there

was, it would destroy all the comforts of society." *Entick*, 95 Eng. Rep. at 817. There is a direct link between these cases and the Fourth Amendment. As Joseph Story put it, the inclusion of the Fourth Amendment in the Bill of Rights "was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution." Joseph Story, *Commentaries on the Constitution of the United States* § 1895 (1833). See also William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 538 (2009) ("[T]he reaction of the colonial press to [the Wilkes] controversy was intense, prolonged, and overwhelmingly sympathetic to Wilkes.").

After the Revolution, provisions were included in a number of State Constitutions that prohibited general warrants. *Maryland* v. *King*, 133 S. Ct. 1958, 1980-1981 (2013) (Scalia, J., dissenting) (quoting Virginia and Maryland provisions); Cuddihy, at 603.

In the debates over ratification of the new Federal Constitution, antifederalists criticized the absence of such a protection, "sarcastically predict[ing] that the general, suspicionless warrant would be among the Constitution's 'blessings.'" *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting); see also Cuddihy, at 674. "Patrick Henry warned that the new Federal Constitution would expose the citizenry to searches and seizures 'in the most arbitrary manner, without any evidence or reason.'" *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting).

The bill of rights proposed by Virginia's ratifying convention included a provision stating that "all general warrants to search suspected places, or to apprehend any suspected person, without specially

naming or describing the place or person, are dangerous and ought not to be granted." Cuddihy, at 684. A number of other States proposed similar language. *Id.* at 685. "The magnitude of [the] publicity [regarding inclusion of an express prohibition on general warrants] indicated the emergence of a consensus for a comprehensive right against unreasonable search and seizure." *Id.* at 686.

By 1789, James Madison had concluded that the new Constitution should be amended to include protection of "essential rights," including providing "security against general warrants." Letter from James Madison to George Eve (Jan. 2, 1789), https://cdn.loc.gov/service/mss/mjm/03/03_0893_0894.pdf; see also *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting) ("Madison's draft of what became the Fourth Amendment answered" the antifederalists' concerns about the lack of any constitutional protection against general warrants.). That protection, subsequently embodied in the Fourth Amendment, was deemed "indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." Story, § 1895.

The initial text of the amendment specifically targeted general warrants issued without particularized suspicion:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

1 *Annals of Cong.* 452 (1789) (Joseph Gales ed., 1834).

The modified language that subsequently was adopted even more emphatically protects against "unreasonable searches and seizures" by affirmatively providing that "[t]he right of the people to be secure * * * against unreasonable searches and seizures[] shall not be violated." See Amar, 30 Suffolk U. L. Rev. at 66-68 & n.54 (discussing this construction in the context of pre-existing state constitutional provisions and the Fourth Amendment). Thus, "even when a warrant is not constitutionally necessary, the Fourth Amendment's general prohibition of 'unreasonable' searches [and seizures] imports the same requirement of individualized suspicion." *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting).

The latter point is particularly important with respect to seizures of individuals, because the common law at the time provided only narrow authority for warrantless arrests. Thus, an arrest for a felony was permissible only if (1) the officer observed the commission of the offense; (2) the arrestee was subsequently convicted (this justification "involved a gamble—the officer had to predict *whether* a felony conviction would result"); or (3) there was proof that the felony "had actually been committed by someone and that there was 'probable cause of suspicion' to think the arrestee was that person." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 632 (1999) (emphasis added).

Only in 1780 did the English courts permit law enforcement officers to arrest based on probable cause even if it turned out that a felony had not been committed. See *Samuel* v. *Payne*, 99 Eng. Rep. 230 (1780). But that case was not published until 1782, it

was not adopted in the United States until some years later, and the Massachusetts constitutional provision on which the Fourth Amendment was based was adopted in 1780. Davies, 98 Mich. L. Rev. at 634-635.

Under the prevailing standard at the time of the Fourth Amendment, therefore, probable cause to believe that the arrestee committed a crime was not sufficient to justify an arrest. An officer also had to be able to prove that a crime in fact had been committed by someone. And if the officer could not satisfy that standard, he was held liable in damages.

This history demonstrates that the Amendment's Framers recognized individualized suspicion as an essential element in establishing the reasonableness of an arrest or search—because of the protection it provided against abuse of government power. The Founding generation saw firsthand how unchecked power could be abused to punish enemies, to quash dissent, or to target unpopular persons or causes. Their solution was to hold government to a standard of reasonableness, based on particularized information, when intruding on individuals' privacy or liberty.

The importance of that safeguard has only increased since the Framers' time.

Government at all levels—federal, state, and local—has expanded in size and authority beyond anything that the Framers could have contemplated. The dramatically enhanced size and power means that government's ability to reach into individuals' lives is correspondingly greater than ever before. The myriad of laws and regulations governing aspects of everyday personal and business activities is mind-

boggling. And the individuals able to exercise that authority—often with little or no effective oversight—numbers in the hundreds of thousands.

Preserving the Fourth Amendment's role as an effective bulwark against unreasonable government intrusions on liberty and privacy is therefore particularly important today.

B. The Probable Cause Standard Requires Reasonably Trustworthy Facts Satisfying Each Element Of The Criminal Offense.

A warrantless arrest is constitutional only if "at the moment the arrest was made, the officers had probable cause to make it." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). That inquiry turns on "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Ibid.*; see also *Michigan* v. *DeFillippo*, 431 U.S. 31, 37 (1979) ("'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense"); *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949) (facts that "warrant a man of reasonable caution in the belief that an offense has been or is being committed" (internal quotation marks omitted)).

Properly calibrating the probable cause requirement is essential to ensure that the Fourth Amendment serves the purpose intended by its Framers.

Setting the standard too low opens the door to illegitimate government intrusion on individuals' liberty for improper reasons or for no reason at all.

That is especially true when, as here, the officer acted without a warrant. "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck*, 379 U.S. at 96.

The content of the probable cause requirement should be shaped by reference to the reason for its existence: to constrain the discretion of law enforcement officers so that intrusions on individual liberty are limited to situations in which there is a sufficient likelihood that the individual committed a crime.

That, in turn, requires a comparison of the facts known to the officer to the elements of the offense—which is the inquiry that this Court has undertaken in reviewing such probable cause determinations. See, *e.g.*, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001); *Michigan* v. *DeFillippo*, 443 U.S. at 36-37.

Petitioners appear to argue (Br. 35) that because the probable cause inquiry is "fluid," an officer need not possess facts sufficient for a "prudent man" to believe that each element of the putative offense is satisfied. Petitioners appear in particular to assert that facts relating to the requisite *mens rea* need not meet this standard. That contention—not endorsed by the Acting Solicitor General in his *amicus* brief—is wrong.

To begin with, a criminal offense cannot be separated from its elements—the elements are what define the crime. *E.g.*, *United States* v. *O'Brien*, 560 U.S. 218, 224 (2010).

Of course, facts directly probative of one element of an offense may in some circumstances provide indirect evidence of another element. But the ultimate inquiry must be whether the reasonably trustworthy facts known to the officer would be sufficient to convince a prudent person that each element is present and any obvious defense is negated.

Petitioners' plea for a special exemption for *mens rea* is particularly misplaced. That element plays an especially critical role in distinguishing criminal from non-criminal conduct. *E.g.*, *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015); *Rosemond* v. *United States*, 134 S. Ct. 1240, 1248 (2014); *Morissette* v. *United States*, 342 U.S. 246, 252 (1952). Permitting an officer to arrest when he or she lacks reasonably trustworthy facts sufficient to convince a prudent person that an individual had the requisite mental state therefore would permit an arrest in a wide variety of circumstances in which the facts known to the officer indicated only entirely lawful activity.

In the aiding-and-abetting context, for example, the *actus reus* may consist of entirely lawful conduct; it is only the actor's *mens rea* that makes the conduct unlawful. *Rosemond*, 134 S. Ct. at 1248-1251. If an officer could arrest someone based solely on knowledge of facts relating to the individual's conduct—without facts justifying the conclusion that the individual acted with the required *scienter*—the officer would be able to seize and detain the individual

without sufficient reason to believe that the individual acted unlawfully.

Respondents have explained in detail why the facts known to the officers here did not satisfy the probable cause standard. Resp. Br. 25-40, 46-57. This Court therefore should uphold the ruling below that the officers lacked probable cause to arrest respondents.

C. The Individual Petitioners Are Not Immune From Damages Liability.

Three Justices have raised serious questions about the Court's qualified immunity jurisprudence. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871-1872 (2017) (Thomas, J., concurring); *Wyatt* v. *Cole*, 504 U.S. 158, 171-172 (1992) (Kennedy, J., joined by Scalia, J., concurring).

Justice Thomas concluded that "[i]n an appropriate case," the Court "should reconsider our qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1872 (concurring opinion).

Here, the lower courts faithfully applied this Court's immunity precedents and correctly concluded that the individual petitioners were not entitled to immunity. Because the current standard provides far broader immunity than either Congress in 1871 or the Fourth Amendment's Framers would have envisioned or countenanced, the Court in this case should not further expand the availability of immunity—which would move the doctrine even farther away from the background principles known to the Congress that enacted Section 1983.

1. *Current Qualified Immunity Doctrine Has No Basis In Congress's Enactment Of Section 1983.*

The Court has justified its immunity decisions by reference to the common law background against which Congress enacted Section 1983. It has "read [the statute] in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986) (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976)) (internal quotation marks omitted). "Certain immunities were so well established in 1871 * * * that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)); accord *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring); *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983).

The Court's qualified immunity standard, however, cannot be justified by this rationale because it does not bear any relation to the background legal principles that applied in 1871. See William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. (forthcoming 2018), https://papers.ssrn.com/sol3/-papers.cfm? abstract_id=2896508; John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013).

a. *The Framers of the Fourth Amendment envisioned broad monetary liability for officers who committed unconstitutional acts.*

Early American cases held executive officers were strictly liable for damages resulting from unlawful acts, including violating the Constitution.

E.g., Baude, at 12 ("at and shortly after the founding, lawsuits against officials for constitutional violations did not generally permit a good faith defense"); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-1864, 1874-1887 (2010); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14-21 (1972).

Chief Justice John Marshall addressed the question of official liability in *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804). The case involved a suit in trespass for damages against a naval captain, who had seized a Danish ship. The Court held that the relevant federal law authorized only seizure of ships headed to a French port, but Little had acted in reliance on orders from the Secretary of the Navy to seize ships departing from—as well as sailing to—French ports.

The Court asked: "Is the officer who obeys [such orders] liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him." 6 U.S. at 178. Even though Captain Little had acted "with pure intention" in reliance on the orders (*id.* at 179), he nonetheless was liable in damages.

Indeed, Chief Justice Marshall, in his opinion for the Court, "confess[ed]" that "the first bias of [his] mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages," but he was "convinced that [he] was mistaken," and

concluded that good faith reliance on the orders could not prevent the imposition of damages liability. 6 U.S. at 179. That "personal aside" shows "the deep roots of the strict liability principle." Baude, at 12.

Little is not at all unique. Damages actions against executive officials were a staple of litigation—and damages were imposed when the official acted unlawfully. David E. Engdahl, 44 U. Colo. L. Rev. at 16-21 (collecting cases); Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 Yale L.J. 1425, 1506 (1987). See, *e.g.*, *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851) (seizure of property); *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806) (upholding action in trespass against official collecting illegal fine).

That historical practice is not surprising. As we have discussed (at pp. 6-8), the protections ultimately embodied in the Fourth Amendment were first enunciated in *Wilkes* and *Entick*—actions in English courts against government officials seeking damages in trespass for harm resulting from unlawful general warrants.

The strict liability rule was ameliorated to a significant degree by the availability of indemnification by government employers. Captain Little, for example, was indemnified through a private bill enacted by Congress. Pfander & Hart, 85 N.Y.U. L. Rev. at 1902. As this Court explained in 1836, "[s]ome personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." *Tracy* v. *Swartwout*, 35 U.S. 80, 98-99 (1836).

Thus, a comprehensive study of the indemnification process at the federal level found that "nineteenth-century legislators viewed reimbursement of a well-founded claim more as a matter of right than as a matter of legislative grace." Pfander & Hart, 85 N.Y.U. L. Rev. at 1867. Accordingly, "[c]ourts were to decide whether the conduct in litigation was lawful and award damages against the officer if it was not; Congress was to decide whether the officer had acted for the government within the scope of his agency, in good faith, and in circumstances that suggested the government should bear responsibility for the loss." *Id.* at 1868. Courts "simply addressed the issue of legality and left Congress in charge of calibrating the incentives of government officials"—which Congress did by "offer[ing] government employees a mix of salary, fees, and forfeitures to ward off bribery and ensure zealous enforcement" and "by indemnifying from any liability only those government officials who acted in good faith." *Id.* at 1870.

b. *The common law in 1871 did not provide a general immunity defense for executive officers, but only specific defenses to certain tort claims.*

The general background principle of strict liability for executive officials' illegal and unconstitutional acts had not been overturned when Section 1983 was enacted in 1871.

To be sure, courts had begun to recognize tailored exemptions from liability in specific circumstances. Thus, *Wasson* v. *Mitchell*, 18 Iowa 153 (1864)—a case cited by this Court in addressing a qualified immunity question in *Filarsky* v. *Delia*, 566 U.S. 377, 383 (2012)—was a suit against a board of

supervisors for approving the bond provided by a constable that subsequently was found to contain forged signatures of the sureties. The Iowa court recognized a rule of immunity limited to that particular factual context, analogizing the board's action to a judicial function:

> If, in the fair exercise of their judgment, they are of opinion that the sureties on a bond are solvent, they are not civilly liable if they should be mistaken; but would be thus liable if they approved a bond whose sureties were known to them to be worthless. * * * [W]e believe this to be the true rule, viz., exempting the board of supervisors, in the approval of bonds, from honest mistake and errors of judgment, whether of law or fact, but holding them at the same time personally liable for negligence, carelessness and official misconduct such as are alleged in the petition.

18 Iowa at 156-157.

In other contexts, courts modified substantive rules of liability to circumscribe liability. Thus, in *The Marianna Flora*, 24 U.S. 1, 52 (1825), the Court held that an official's decision to retain a captured ship for adjudication would not subject him to liability where "he acted with honourable motives, and from a sense of duty to his government" and not "with gross negligence or malignity, [or] a wanton abuse of power." A similar process led courts to hold that law enforcement officers could not be held liable in tort for an arrest as long as the officer acted with probable cause—even if the arrestee was subse-

quently exonerated. See Davies, 98 Mich. L. Rev. at 634-639 (1999); pp. 10-11, *supra*.[3]

But there certainly was no generally-accepted, across-the-board immunity principle for executive officials who violated the Constitution. See, *e.g.*, *Milligan* v. *Hovey*, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871) (No. 9,605) (holding that a federal statute barring damages liability for acts in connection with the Civil War was unconstitutional as applied to claims based on unconstitutional acts); *Griffin* v. *Wilcox*, 21 Ind. 370, 372-373 (1863) (same); see also Baude, at 16 & n.72; Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 Minn. L. Rev. 585, 585 (1927) ("[p]rior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts").[4]

---

[3] This Court cited that principle in *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)—but relied on twentieth century authorities. See *ibid.* (referring to "the prevailing view in this country").

[4] Professor Baude discusses *Myers* v. *Anderson*, 238 U.S. 368 (1915), which involved a damages claim against government officials who had refused to register the plaintiffs to vote because state law barred registration of African-Americans. The defendants argued that the damages judgment should be set aside because—among other reasons—they had acted in the good faith belief that the statute was constitutional. This Court upheld the judgment against the state officials, although it did not expressly discuss the good faith defense. Baude, at 13-15.

c. *Current qualified immunity jurisprudence bears no resemblance to the defenses available to executive officers at common law—and produces much more expansive immunity.*

The qualified immunity rule that the Court applies today bears no resemblance to any principle recognized at common law in 1871.

Availability of immunity "turns on the 'objective legal reasonableness' of the [defendant's] action, assessed in light of the legal rules that were 'clearly established' at the time [it] was taken." *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (citation omitted) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that, in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640 (citation omitted). The officer's subjective good faith and subjective belief about the constitutionality of his or her actions are wholly irrelevant. *Harlow*, 457 U.S. at 815-819 (1982).

But the common law precedents that the Court has cited turn, at least in part, on the subjective good faith of the government official. See pp. 19-21, *supra*. And the relevant common law decisions at the time Section 1983 was enacted—to the extent they recognized any immunity at all—examined both subjective good faith and the objective reasonableness of the defendant's actions.

Moreover, courts in 1871 undertook the latter inquiry from a very different perspective than this

Court's current qualified immunity jurisprudence. They precluded immunity when the defendant acted negligently or recklessly in violating the Constitution. That is a much more restrictive immunity standard than a rule that permits liability only when the constitutional violation was apparent.

In sum, the Court's current qualified immunity jurisprudence confers immunity based on different standards—and in a broader range of situations—than did the common law at the time Section 1983 was enacted.

d. *There are strong reasons for the Court to reconsider its qualified immunity jurisprudence in an appropriate case.*

The Court has observed that, as a general matter, *stare decisis* considerations are strongest with respect to questions of statutory interpretation. That principle does not apply here, for several reasons.

First, the absence of a qualified immunity rule at the Founding rested in part on the availability of indemnification. See pp. 18-19, *supra*. Indemnification is widely available today.

A comprehensive study of indemnification in the context of claims against police officers over a five-year period (from 2006-2011) found that law enforcement officers "almost never contributed to settlements and judgments in police misconduct lawsuits during the study period." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912 (2014). In particular:

- "Approximately 9225 civil rights cases were resolved with payments to plaintiffs between

> 2006 and 2011 in the forty-four largest jurisdictions in [the] study. Officers financially contributed to settlements or judgments in approximately .41% of those cases."
>
> - "Indemnification practices in the thirty-seven small and mid-sized jurisdictions in [the] study are consistent with practices in the larger departments. None of the 8141 officers employed by these thirty-seven jurisdictions contributed to a settlement or judgment in any type of civil claim resolved from 2006 to 2011."

Id. at 912, 915 (footnotes omitted).

The Court's immunity decisions have not taken account of the widespread availability of indemnification.

Second, scholars have noted the Court's "special treatment of qualified immunity issues on its certiorari docket." Baude, at 39; see also Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (And Maybe Some of Them, Too)*, 45 J. Marshall L. Rev. 1023 (2012).

"[N]early all of the qualified immunity cases come out the same way—by finding immunity for the officials. Indeed, in the 35 years" since *Harlow*, the Court "has applied it in 27 qualified immunity cases. The officials have won all but three—maybe two and a half." Baude, at 39; see also Bendlin, 45 J. Marshall L. Rev. at 1025-1026 (observing that the Court has "grant[ed] qualified immunity in every case except the most egregious instances of incompetent

conduct by state officials").[5] Because "lower courts are somewhat regularly reversed for erring on the side of liability, but almost never reversed for erring on the side of immunity, the current docket sends them a signal that they should drift toward immunity." *Id.* at 40.

This factor therefore puts an additional, heavy, weight on the scale in favor of reconsidering the qualified immunity standard in an appropriate case.

Third, there are particular reasons to reconsider the qualified immunity standard as it applies to Fourth Amendment claims.

To begin with, the Framers of the Fourth Amendment anticipated that damages actions would be the means by which the Amendment was enforced. The English cases that gave rise to the Amendment—*Wilkes* and *Entick*—were damages actions. And the antifederalists who agitated for an express amendment to the Constitution protecting against general warrants saw damages awards by juries as the mechanism by which that protection would be enforced:

> [S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the [C]onstitution of the United

---

[5] In addition, the Court summarily reverses decisions denying qualified immunity at a greater rate than any other category of case other than habeas petitions. Baude, at 41-43. This "special dispensation from the normal principles of certiorari" (*id.* at 42) multiplies the impact of the legal flaws in the Court's qualified immunity jurisprudence.

> States? * * * [N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury—[i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression. * * * [By contrast,] an American judge, who will be judge and jury too, [will probably] spare the public purse, if not favour a brother officer.

Essays by a Farmer (I) (Feb. 15, 1788), *reprinted in* 5 *The Complete Anti-Federalist* 14 (Herbert J. Storing ed., 1981); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 777 (1994) ("[n]otes from a speech delivered by Marylander Samuel Chase suggest that the future Justice likewise saw juries and warrants as linked and stressed the need for civil juries in trespass suits against government 'officers'" (citing Notes of Samuel Chase (IIB), in 5 *The Complete Anti-Federalist* 82 (Herbert J. Storing ed., 1981))).

That is precisely how the Amendment was enforced. "[A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit—with both parties represented at trial and a jury deciding between the government and citizen. If the jury deemed the search or seizure unreasonable—and reasonableness was a classic jury question—the citizen plaintiff would win and official would be obliged to pay (often heavy) damages. Any federal defense that the official might try to claim would collapse, trumped by the finding that the federal action was unreasonable, and thus unconstitutional under the Fourth Amendment, and thus no de-

fense at all." Akhil Reed Amar, 107 Harv. L. Rev. at 774 (footnote omitted).

The current qualified immunity standard significant limits the availability of such damages actions in the Fourth Amendment context because where, as here, the constitutional standard is heavily fact-dependent—whether "probable cause" or "exigent circumstances" or "excessive force"—the government official will argue that the absence of prior cases with similar facts precludes the imposition of damages liability. That is not at all what the Framers of the Fourth Amendment, or the Congress that enacted Section 1983, intended.

In addition, the Framers of the Fourth Amendment, and Congress in 1871, saw the jury's role in damages actions as a critical element of the Constitution's protection against unreasonable intrusions on liberty and privacy. See pp. 25-27, *supra*. But the Court's current qualified immunity standard was expressly designed to eliminate the jury's role and promote resolution of qualified immunity claims on summary judgment by eliminating the requirement of subjective good faith. *Harlow*, 457 U.S. at 815-818. That too is squarely inconsistent with Congress's and the Framers' intent.

The current immunity standard's substantial constriction of the damages remedy enacted by Congress in Section 1983 is particularly consequential in light of the Court's recent jurisprudence regarding the alternative mechanism for enforcing the Fourth Amendment—the exclusionary rule. The recognition and expansion of the good faith exception to that rule, particularly if it were extended to warrantless searches and seizures, would mean that there would be no remedy at all for large categories of serious

Fourth Amendment violations that inflict significant harm.

The absence of any effective remedy raises serious questions about the extent to which the Fourth Amendment's protections can be enforced—and therefore violations of those protections adequately deterred.[6]

For all of these reasons, the Court should reconsider its qualified immunity jurisprudence in an appropriate case. It need not do so here, because the court below properly applied the Court's precedents. To reverse the decision below would mark a further

---

[6] Recent reports by the Department of Justice reveal widespread Fourth Amendment violations in a number of police departments. See, *e.g.*, U.S. Dep't of Justice, *Investigation of the Chicago Police Department* 5 (Jan. 13, 2017) (finding that Chicago police officers "engage in a pattern or practice of using force, including deadly force, that is unreasonable" and that "officers' force practices unnecessarily endanger themselves and others and result in unnecessary and avoidable shootings and other uses of force"); U.S. Dep't of Justice, *Investigation of the Cleveland Division of Police* 3 (Dec. 4, 2014) (finding "reasonable cause to believe" that the Department "engages in a pattern or practice of using excessive force in violation of the Fourth Amendment"). Those reports are corroborated by information developed in other contexts. D.C. Police Complaints Board, *Report and Recommendations: Warrantless Entries into Private Homes by MPD Officers* 2-5, 11-13 (June 12, 2013) (analyzing complaints about unlawful entries into homes by police officers); *Floyd* v. *City of New York*, 959 F. Supp. 2d 540, 559, 560 (S.D.N.Y 2013) (finding "*at least* 200,000 [*Terry*] stops were made without reasonable suspicion"; that "blacks were 30% more likely to be arrested (as opposed to receiving a summons) than whites, for the same suspected crime"; and that "blacks who were stopped were about 14% more likely—and Hispanics 9% more likely—than whites to be subjected to the use of force").

erosion of accountability for Fourth Amendment violations, contrary to the intent of the Framers and Congress's purpose in enacting Section 1983.

2. The lower courts properly rejected respondents' immunity claim.

The Court should uphold the lower courts' conclusion that immunity is not available here, for several reasons.

First, any expansion of the current immunity standard would move even farther away from the legal background against which Congress acted when it adopted the statute in 1871. The Congress that enacted Section 1983 would have anticipated broad executive officer liability for Fourth Amendment violations, which was the norm at common law. See pp. 16-21, *supra*.

Second, the Court should reject petitioners' contention that immunity is available in the absence of multiple judicial decisions holding the facts known to the officers—or closely analogous facts—insufficient to satisfy probable cause. Given the intensely fact-specific nature of the probable cause inquiry, and the limitless factual contexts in which arrests are made, that is a recipe for transforming qualified immunity into close-to-absolute immunity for warrantless searches and seizures. See *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances").

The probable cause standard itself leaves substantial room for officer mistakes. "[T]he Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.' * * *

[Thus,] 'searches and seizures based on mistakes of fact can be reasonable. * * * The limit is that 'the mistakes must be those of reasonable men.'" *Heien* v. *North Carolina*, 135 S. Ct. 530, 536 (2014) (citation omitted) (quoting *Brinegar*, 338 U.S. at 176). The same is true of mistakes of law. *Id.* at 536-537.

In the arrest context, when the elements of the offense for which the arrest was made are clearly set forth in the relevant statute or in settled caselaw, the probable cause standard itself provides sufficient protection for the officer's application of those legal rules to the facts at hand. The legal standard itself allows the officer to make "mistakes"—there is no need for additional protection to satisfy the purposes of qualified immunity, even under the Court's current standard. As respondents explain (Br. 16-46), petitioners are not entitled to immunity under that standard.

In a future case, the Court should be consider adopting an immunity standard that will return Section 1983 claims to the standard prevailing at the time the law was adopted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CECILLIA D. WANG
EZEKIEL R. EDWARDS
American Civil Liberties Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

ARTHUR B. SPITZER
SCOTT MICHELMAN
American Civil Liberties Union of the District of Columbia
4301 Connecticut Avenue, NW Suite 434
Washington, DC 20008
(202) 457-0800

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic[*]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

Counsel for Amici Curiae

JULY 2017

---

[*] The representation of *amici* by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

MOTION FILED
JUL 8 - 2016
RECORD AND BRIEFS

No. 15-1485

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,
Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

CHARLES W. THOMPSON, JR.
Executive Director
International Municipal
Lawyers Association
7910 Woodmont Ave.
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

KYMBERLY K. EVANSON
Counsel of Record
TANIA M. CULBERTSON
Pacifica Law Group LLP
1191 2nd Ave., Ste 2000
Seattle, WA 98101
(206) 245-1700
Kymberly.Evanson@pacificalawgroup.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF BEFORE THE COURT'S CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI

The International Municipal Lawyers Association (IMLA), by its undersigned counsel, hereby moves the Court for an order granting leave to file an amicus curiae brief before the Court's consideration of the District of Columbia, Andre Parker, and Anthony Campanale's Petition for a Writ of Certiorari, pursuant to Supreme Court rule 37.2(b). Respondents Theodore Wesby, *et al.*, have withheld their consent to the filing of the amicus curiae brief.

As detailed below, members of IMLA regularly provide advice to municipalities and their law enforcement agencies regarding probable cause and qualified immunity. Amicus requests the opportunity to present an amicus curiae brief in this case because its members are keenly interested in the chilling effect the court of appeals' decision will have on municipalities' ability to provide effective and responsible law enforcement.

Respectfully submitted,

KYMBERLY K. EVANSON
Counsel of Record
TANIA M. CULBERTSON
Pacifica Law Group LLP
1191 Second Ave.
Suite 2000
Seattle, WA 98101-3404
(206) 245-1700
Kymberly.Evanson@pacificalawgroup.com

CHARLES W. THOMPSON
Executive Director
International Municipal
Lawyers Association
7910 Woodmont Ave.
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

Counsel for Amicus Curiae
International Municipal
Lawyers Association

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF BEFORE THE COURT'S CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Officers Are Not Required To Credit One Set of Conflicting Statements Over Other Evidence of Criminal Activity 5

A. The *Wesby* Opinion Conflicts With Established Law Recognizing the Sufficiency of Circumstantial Evidence of Mens Rea in Determining Probable Cause 5

B. Arresting Officers Should Be Afforded Latitude to Consider All the Evidence of Mens Rea Crimes 8

II. Qualified Immunity Should Protect Officers Who Reasonably Discount a Suspect's Non-Credible Explanation for Apparent Criminal Activity 12

III. The Standard Created By the Court of Appeals Will Chill Law Enforcement 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Askew v. City of Chicago,
440 F.3d 894 (7th Cir. 2006) 18

Conner v. Heiman,
672 F.3d 1126 (9th Cir. 2012) 8, 9, 12

Cox v. Hainey,
391 F.3d 25 (1st Cir. 2004) 7, 8, 10, 12, 13

Curley v. Village of Suffern,
268 F.3d 65 (2d Cir. 2001) 14, 15

Florida v. Harris,
133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013) 17

Figueroa v. Mazza, No. 14-4116-CV,
2016 WL 3126772 (2d Cir. June 3, 2016) 13

Garcia v. Does,
779 F.3d 84 (2d Cir. 2015) 13, 14

Illinois v. Gates,
462 U.S. 213, 103 S. Ct. 2317,
76 L. Ed. 2d 527 (1983) 16

Locke v. United States,
7 Cranch 339 (1813) 16

Malley v. Briggs,
475 U.S. 335, 106 S. Ct. 1092,
89 L. Ed. 2d 271 (1986) 13, 18

Moore v. United States,
757 A.2d 78 (D.C. 2000) 9

Mullenix v. Luna,
136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) 13

Paff v. Kaltenbach,
204 F.3d 425 (3d Cir. 2000) 7, 8

Panetta v. Crowley,
460 F.3d 388 (2d Cir. 2006) 14, 15

Reynolds v. Jamison,
488 F.3d 756 (7th Cir. 2007) 15, 18

Romero v. Fay,
45 F.3d 1472 (10th Cir. 1995) 14

State in Interest of D.M.,
91 So. 3d 296 (La. 2012) 9

State v. Maxwell,
699 So.2d 512 (1997) 10

State v. McKnight,
737 So.2d 218 (1999) 10

State v. Midell,
798 N.W.2d 645 (N.D. 2011) 11

United States v. Arvizu,
534 U.S. 266, 122 S. Ct. 744,
151 L. Ed. 2d 740 (2002) 6

United States v. MacPherson,
424 F.3d 183 (2d Cir. 2005) 6

Zalaski v. City of Hartford,
723 F.3d 382 (2d Cir. 2013) 6, 7, 17

Statute

North Dakota Century Code § 12.1-20-03 11

INTEREST OF *AMICUS CURIAE*[1]

IMLA is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

Members of IMLA regularly advise municipalities and their law enforcement agencies on issues pertaining to probable cause and qualified immunity.

---

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than Amicus and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.6. Counsel of Record for Petitioners were provided with notice of Amicus' intent to file an amicus curiae brief on June 1, 2016 which is more than 10 days before the July 8, 2016 due date for this brief. Consent was granted. Counsel of Record for Respondents was provided with notice of Amicus' intent to file an amicus curiae brief on June 20, 2016 which is more than 10 days before the due date for this brief. Respondents did not respond to Amicus' notice.

Therefore, IMLA has a strong interest in this dispute. As a representative of local governments committed to effective and responsible policing, IMLA urges this Court to grant certiorari and reverse the court of appeals' decision.

SUMMARY OF ARGUMENT

Should a police officer arrest a person based on a shopkeeper's cry of theft; a woman's claim of rape; a burglar alarm sounding; or, as in this case, a group of people partying in what for all the evidence appears to be an abandoned dwelling when the owner asserts no permission for its use had been given? Could an officer and society be placed in a more precarious position than one in which the officer loses immunity from suit by exercising the discretion to believe one but not the other of two conflicting claims? The court below chose a strange path to follow in articulating the standard for determining probable cause and applying qualified immunity, ultimately deciding this case in conflict with both this Court's precedent and authority from other courts across the country.

Thus, the questions presented by this appeal are 1) whether law enforcement officers must credit a suspect's non-credible claim of an innocent mental state over other circumstantial evidence of culpability in assessing probable cause for arrest; and 2) whether, even if an officer is not entitled to do so, the law was clearly established in this regard. Amicus asserts that the answer to both of these questions is no.

The facts of this case are not in dispute. Officers were called to the scene after complaints by neighbors of a loud party at a house known to be vacant.

App. 119a. When the officers arrived, the partiers scattered and some hid. Officers observed what appeared to be strippers and smelled marijuana. *Id.* The house was virtually unfurnished. Upon inquiry, the partiers gave conflicting statements about the nature of the gathering: some said it was a birthday party, some said it was a bachelor party, but no one could identify the guest of honor. App. 4a. A few of the partiers stated they had been invited by a woman named Peaches, though when reached on the phone, Peaches ultimately admitted she did not have authority to invite anyone to the house and refused to come to the house upon fear of arrest. App 5a. The owner of the house likewise told the officers on the phone that no one should be in the house at all. *Id.* The officers eventually arrested the partiers for trespass, though the charges were ultimately dropped.

This Section 1983 action for false arrest followed. The district court denied the officers' motion for summary judgment on the basis of qualified immunity and the officers appealed. The majority and dissenting opinions of the court of appeals agreed that the only issue in dispute was the partiers' mental state at the time of the arrest: namely, did the partiers know, or *should they have known*, that their presence was unauthorized in the home?[2] In finding no probable

---

[2] While the question of the partiers' objective and subjective intent informs the determination of guilt in a trespass case, it cannot be the question in determining whether officers had sufficient probable cause to arrest as it is the officers' judgment that matters. Indeed, under Fourth Amendment jurisprudence the question of whether the seizure was reasonable and based on probable cause controls.

cause for their arrest, the majority held that the objective evidence of criminal activity was insufficient to support probable cause when weighed against the partiers' assertion of an invitation. As a result, the court determined that the officers were personally liable in damages for false arrest.

The court of appeals' decision creates an unworkable standard for local law enforcement whereby officers are precluded from discrediting unreliable assertions of innocence, even in the face of objective circumstantial evidence of criminal activity. This result is directly contrary to the flexible probable cause and qualified immunity standards repeatedly articulated by this Court and other federal and state courts that allow officers to consider circumstantial evidence of a culpable mental state and discount a suspect's "innocent explanation" when objectively reasonable to do so. Effective and responsible law enforcement depends on this "breathing room" afforded to officers to make judgment calls, even if they are ultimately reasonably mistaken in fact or law. Here, even if the officers were ultimately mistaken about the partiers' defense of an invitation, their mistake was objectively reasonable such that qualified immunity should have applied.

Though the court of appeals characterized the decision below as "fact-bound", the repercussions of its opinion extend far beyond the trespassing context in which it was made, and impose an impossible standard under which officers in the field must take the place of prosecutors and juries in determining whether a suspect is guilty, and face personal liability if they believe the wrong person. This heightened standard

will chill enforcement of other crimes beyond trespassing, ultimately impeding effective law enforcement via threat of damages. For these reasons, Amicus respectfully requests this Court grant the District's petition and reverse.

ARGUMENT

I. Officers Are Not Required To Credit One Set of Conflicting Statements Over Other Evidence of Criminal Activity.

A. The *Wesby* Opinion Conflicts With Established Law Recognizing the Sufficiency of Circumstantial Evidence of Mens Rea in Determining Probable Cause.

In *Wesby*, the majority held that the partiers' assertions of an invitation from Peaches vitiated the intent requirement for the offense, and as a result, the officers had no probable cause on which to base their arrests. App. 11a. Implicit in this holding was the rejection of the circumstantial evidence of criminal activity that suggested the partiers knew or at least should have known that their entry was unlawful. This evidence included the vacant state of the house, the marijuana smell, the admission of Peaches that she lacked authority to invite anyone to the house and her statement that she would be arrested if she came to the house, the guests scattering and hiding when the police arrived, the partiers' conflicting statements about the reason for the party (and not knowing who the guest of honor was), and the owner's statement that no one was allowed to be at the house. What if instead of a party, the police caught a person with burglary tools in the

vacant house after a burglar alarm sounded but when confronted the person claimed "Peaches" told him he could enter the home and take whatever "wasn't tied down" while the owner of the home asserted the contrary? While the seemingly harmless nature of a marijuana party may make the lower court's decision seem inconsequential, its holding can cause substantial damage to law enforcement by imposing personal liability on the basis of "in the field" mens rea-related judgment calls. In doing so, the decision changes immunity analysis in cases involving probable cause from determining what the arresting officer legitimately perceived to determining what is on the mind of the subject of an arrest converting officer liability from matters over which the officer has control to those within the sole control of a plaintiff.

Moreover, the *Wesby* decision is at odds with the opinions of numerous circuit courts holding that "[a]n assessment of intent frequently depends on circumstantial evidence." *Zalaski v. City of Hartford*, 723 F.3d 382, 393 (2d Cir. 2013) (citing *United States v. MacPherson,* 424 F.3d 183, 189–90 (2d Cir. 2005) (collecting cases recognizing that mens rea elements of knowledge and intent are often proved through circumstantial evidence)). This Court has likewise long recognized that police officers are allowed "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744 151 L. Ed. 2d 740 (2002). When drawing these inferences, the "availability of alternative inferences does not prevent a finding of probable cause so long as the inference upon which the

officer relies is reasonable." *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004).

The officers here reasonably inferred from the circumstantial evidence available to them at the time that the partiers knew or should have known their presence was unauthorized. Considering this evidence over the partiers' asserted invitation is consistent with trespassing law. As the Third Circuit has acknowledged, nearly all suspected trespassers are likely to claim an innocent mental state, observing, "[a]bsent a confession, the officer considering the probable cause issue in the context of crime requiring a *mens rea* on the part of the suspect will always be required to rely on circumstantial evidence regarding the state of his or her mind." *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000). The Second Circuit recently agreed, holding that an arresting officer had arguable probable cause to arrest (and thus qualified immunity) where the circumstantial evidence demonstrated the plaintiff protestors' intent to commit defiant trespass, despite their claim of innocent state of mind. *Zalaski*, 723 F.3d 382. In each of these cases, the courts applied the proper "totality of the circumstances" analysis to the presence of probable cause. And, in each case, the officers were not required to accept the statements of suspected trespassers over other circumstantial evidence of criminal activity. As observed in the dissent from the denial of rehearing en banc, in light of the higher burden of proof for a conviction as compared to the probable cause standard, "[i]f juries in trespassing cases can refuse to credit defendants' explanations for their unlawful presence in buildings, police officers surely can do the same." App. 136a.

Despite this authority, the *Wesby* court concluded that the officers' observations of apparent criminal activity did not amount to the type of information sufficient to overcome the partiers' assertion of an invitation. The opinion is thus out of step with the bulk of authority that recognizes that police must make "judgment calls" in determining a suspect's state of mind for purposes of probable cause and that those calls necessarily involve a practical assessment of the totality of the circumstances. *See Paff*, 204 F.3d at 437.

B. Arresting Officers Should Be Afforded Latitude to Consider All the Evidence of Mens Rea Crimes.

The ramifications of the *Wesby* opinion are brought into sharper focus by examining its potential impact on municipal law enforcement in areas other than trespassing offenses. Specifically, viewing the *Wesby* standard in the context of other offenses illustrates the importance of an officer's ability to assess all the facts and circumstances at the time of arrest and highlights the potential chilling effect of requiring officers to discount such evidence or face personal liability. As the First Circuit observed in *Cox v. Hainey*, 391 F.3d at 34, the "practical restraints on police in the field are greater with respect to ascertaining intent and, therefore, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great."

For example, circumstantial evidence of culpability is frequently considered in property crimes like theft and possession of stolen goods. In *Conner v. Heiman*, 672 F.3d 1126 (9th Cir. 2012), the Ninth Circuit reversed the district court's finding of a lack of

probable cause on an arrest for theft, where the circumstances suggested that a casino patron who refused to return an overpayment "knowingly controlled the [casino's] property and intended to deprive [the casino] of that property." *Id.* at 1133. Though as in *Wesby*, the actus reus of the crime was complete (the defendant had refused to return the money), the district court nonetheless refused to apply qualified immunity because "a reasonable jury could find that there was no probable cause to believe that plaintiff had the requisite mens rea for theft." *Id.* at 1130. The district court posited that the suspect behaved in a manner "consistent with" an innocent person and reserved the qualified immunity question for the jury. Reversing, the court of appeals held that the district court should have decided the qualified immunity question, and held that the officers "could have reasonably concluded that they had probable cause" of a culpable mental state based on circumstantial evidence. The court considered that the nature of the overpayment "would have been obvious to most players" and that the suspect was rude and defensive when confronted by employees about the overpayment. *Id.* at 1133. In light of this evidence of the suspect's mental state, the officers had probable cause for the arrest.[3]

---

[3] *See also State in Interest of D.M.*, 91 So. 3d 296, 299-300 (La. 2012) (circumstantial evidence demonstrated that the defendant "knew or reasonably should have known" the vehicle in which he was riding was stolen and considering defendant's "flight, concealment, and initial resistance to arrest" and that he had observed damage to the steering column and the ignition of the stolen van); *Moore v. United States*, 757 A.2d 78, 83 (D.C. 2000) (a jury may infer the requisite state of mind for the offense of receiving stolen property

Drug crimes also often require evaluating circumstantial evidence of mens rea at the time of arrest. In *State v. McKnight*, 737 So.2d 218 (1999), the trial court found no probable cause to hold a suspect for "knowing" possession of cocaine. The Court of Appeal of Louisiana reversed, holding that the suspect's possession of a crack pipe with cocaine residue was sufficient to support the probable cause determination that "it was more probable than not that the defendant [knowingly] possessed cocaine." *Id.* at 220 n.2. Quoting *State v. Maxwell*, 699 So.2d 512, 514 (1997), the court stated "the issue is **not** a finding beyond a reasonable doubt that the defendant was aware of the residue in the pipe. That issue must be decided at trial." *McKnight*, 699 So.2d at 219 (emphasis in original). Likewise, in *Cox v. Hainey*, the First Circuit determined that, based on the circumstantial evidence, the arresting officer reasonably inferred that the suspect had intentionally furnished prescription drugs to his minor son. 391 F.3d at 33-34. Thus, despite the suspect's assertions that he scrupulously guarded his pills, the officer appropriately considered the son's statement about his ability to procure marijuana from his father, "tending to suggest that the appellant was consciously abetting his son's drug-trafficking activities." *Id.* Though acknowledging the inference between the son's offer of marijuana and the prescription drug charge was "somewhat attenuated", the court concluded that the difficulty of ascertaining intent in the field warranted greater latitude for

---

where evidence reveals defendant's unexplained (or unsatisfactorily explained) possession of recently stolen property) (collecting cases).

arresting officers engaged in making mens rea "judgment calls." As noted in the dissent from denial of rehearing en banc, "the drugs aren't mine" is undoubtedly a common assertion in drug arrests. App. 126a. While this may in fact be true, an officer must at least be permitted to evaluate and consider circumstances suggesting otherwise to determine whether probable cause exists to support an arrest.

Finally, consider a scenario where the police respond to a call and a man asserts that an unconscious woman was raped by another man still at the scene. The accused claims consent, but the officer perceives some evidence of rape present; is that enough to support an arrest? Sexual assault and other sex crimes often require officers to make probable cause determinations on the basis of circumstantial and conflicting evidence of mens rea. For example, in *State v. Midell*, 798 N.W.2d 645 (N.D. 2011), the defendant was charged with engaging in sexual activity with a victim who the person "knows or has reasonable cause to believe" is unaware that a sexual act is being committed upon her. *Id.* at 648 (citing N.D.C.C. § 12.1-20-03(1)(c)). The victim claimed she awoke to find the suspect having sex with her, while the suspect claimed the sex was consensual. In reversing the lower court's failure to find probable cause for arrest, the Supreme Court of North Dakota held that the suspect's knowledge "is a classic question of fact for the jury that rests almost completely on the credibility of witnesses." *Id.* at 649. Thus, the statement of the victim and other circumstances were sufficient to establish probable cause, notwithstanding the suspect's claim to the contrary.

The *Wesby* majority opinion discounted circumstantial evidence of culpability at the time of arrest that is at least as probative—if not more so—than the mens rea evidence relied upon in the above authorities. For example, the obviously vacant condition of the house, (further corroborated by the neighbor's statement that the house was known to be vacant), is at least as probative as the "obvious" nature of the overpayment considered knowledge of theft by the Ninth Circuit in *Connor v. Heiman*. Similarly, the conflicting stories offered by the partiers, along with hiding from the officers, should have been given consideration here just as the *Connor* court considered the suspect's rude and defensive response to the casino employee's inquiries. 672 F.3d at 1133.

In sum, the officers here rightly considered the totality of the circumstances in evaluating probable cause, including the requisite mens rea of the partiers. In so far as the *Wesby* opinion requires officers to credit conflicting statements over other evidence of criminal activity, this Court should reverse.

II. Qualified Immunity Should Protect Officers Who Reasonably Discount a Suspect's Non-Credible Explanation for Apparent Criminal Activity.

As discussed above, the probable cause standard is less than that imposed at trial, but the qualified immunity standard is lesser still. As the First Circuit observed in *Cox*, the "reasonableness standards underlying the probable cause and qualified immunity standards are not coterminous." *Cox*, 391 F.3d at 31. This is because the qualified immunity doctrine is "designed to afford officials an added measure of

protection against civil liability." *Id.*; *see also Figueroa v. Mazza*, No. 14-4116-CV, -- F.3d -- , 2016 WL 3126772, at *6 (2d Cir. June 3, 2016) (qualified immunity inquiry is not whether the officer *should have* acted as he did, but whether *any* reasonable officer *could have* determined that the challenged action was lawful) (emphasis in original) (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). As such, even if this Court determines that the officers here were required to accept the partiers' claim of an invitation to the exclusion of all other evidence of unlawful entry, qualified immunity would still attach because this standard was not "clearly established" at the time of the arrests. *See Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015).

To the contrary, numerous cases hold that an officer may discount a suspect's version of events, unless a suspect's claim of innocence is such that "any reasonable officer would understand that an arrest under the circumstances would be unlawful." *Garcia v. Does*, 779 F.3d 84, 96 (2d Cir. 2015)[4]. This standard

---

[4] As the *Garcia* court explained:

> We are not concerned with whether plaintiffs' asserted belief that the officers' behavior had given them implied permission to violate traffic laws otherwise banning pedestrians from the roadway would constitute a defense to the charge of disorderly conduct; that issue would be presented to a court adjudicating the criminal charges against plaintiffs. Instead, we are faced with the quite separate question of whether any such defense was so clearly established as a matter of law, and whether the facts establishing that defense were so clearly apparent to

gives adequate leeway for officers to discredit non-credible assertions at the time of arrest. Moreover, it is well-established that "[o]nce an officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Curley v. Village of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001); *see also Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006) ("The fact that an innocent explanation may be consistent with the facts alleged ... does not negate probable cause.") (citation omitted). The *Wesby* opinion is contrary to this and other authority applying qualified immunity where an officer reasonably rejects a suspect's claim of an innocent state of mind.

For example, in *Romero v. Fay*, 45 F.3d 1472, 1477-78 (10th Cir. 1995), the Tenth Circuit reversed a district court's refusal to apply qualified immunity for a false arrest claim that arose out of a murder investigation. The plaintiff murder suspect alleged that the officer had failed to investigate his alibis and thus the suspect's arrest was unlawful for lack of probable cause. Applying qualified immunity, the court of appeals held that police officers are not required to forego making an arrest based on facts supporting probable cause simply because the arrestee offers a different explanation. 45 F.3d at 1478 n.3. Likewise, in *Curley v. Village of Suffern*, the Second Circuit found

---

> the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs.

Garcia, 779 F.3d at 93.

probable cause to uphold the arrest of a bar owner, and thus hold the officers immune from suit, even in the face of conflicting stories about the origins of the subject bar fight, and over the owner's protestations of innocence. 268 F.3d at 70. Finally, in *Reynolds v. Jamison*, 488 F.3d 756, 768 (7th Cir. 2007), the plaintiff sued for wrongful arrest over violation of a protective order. The plaintiff alleged that the protective order provided an exception for the location where the plaintiff was arrested and the arresting officer "should have either believed him or allowed him to retrieve a copy of the order from his home." *Id.* at 768. The Seventh Circuit rejected this claim, reiterating that once the officer "had probable cause, he was under no constitutional obligation to further investigate Reynolds' possible innocence." *Id.* at 768; *see also Panetta*, 460 F.3d 388 (applying qualified immunity to officer who arrested horse owner for animal neglect, despite owner's innocent explanation of horse's condition and offer to call veterinarian to corroborate).

All told, a suspect's version of events is only one piece of the puzzle. Where conflicting other evidence makes it reasonable to do so, courts have held that officers can discount a suspect's explanation for apparent criminal activity. As such, the *Wesby* court's conclusion to the contrary does not represent "clearly established law" sufficient to impose personal liability on officers. The court of appeals should be reversed.

III. The Standard Created By the Court of Appeals Will Chill Law Enforcement.

Law enforcement officers are tasked with making "in the moment" assessments of criminal activity, often in dangerous situations where facts are unclear and emotions are high. Victims, witnesses and the general public depend on officers to use good and reasonable judgment, calling on their expertise and experience to evaluate the situation on the ground, without constant fear of personal liability. The law recognizes that an officer's determination of probable cause is not the same calculus conducted by courts and lawyers from the comfort of their desks. Rather, as this Court has held:

> As early as *Locke v. United States*, 7 Cranch 339, 348 (1813), Chief Justice Marshall observed, "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion." . . . . While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.

Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (internal citations and quotations omitted).

Following this Court's directive, the circuit courts have likewise explained that probable cause is a "fluid"

standard that "does not demand hard certainties or mechanistic inquiries"; nor does it "demand that an officer's good-faith belief that a suspect has committed or is committing a crime be correct or more likely true than false." *Zalaski*, 723 F.3d at 389-90 (citations and internal quotation marks omitted). As such, probable cause for arrest requires only facts establishing "the kind of fair probability" on which a "reasonable and prudent" person, as opposed to a "legal technician[ ]," would rely. *Florida v. Harris*, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61 (2013) (internal quotation marks omitted). This level of flexibility applies equally to the determination of probable cause for the necessary mental element of a crime, and permits an officer in the field to evaluate the "totality of the circumstances" in assessing probable cause with respect to culpability. In making this evaluation, officers who reasonably discount non-credible explanations of otherwise apparent criminal activity should be granted qualified immunity.

By denying qualified immunity here, the court of appeals' decision suggests that officers must reject circumstantial evidence of a culpable mental state if the suspect offers a contrary explanation or face personal liability. The majority opinion conflicts with numerous state and federal court decisions holding that circumstantial evidence may be properly considered in determining mens rea, both at the arrest stage and under the significantly higher burden applied at trial. As exemplified by the decisions discussed above, this means that officers should be able to consider circumstantial evidence that tends to support a suspect's mental state, but also disregard conflicting evidence when reasonable to do so. For the

purposes of qualified immunity, the touchstone for determining probable cause lies, not in the mental state of the accused, but in the totality of the circumstances available to and considered by the arresting officer. As the Seventh Circuit explained in *Reynolds*, "[l]aw enforcement officers often encounter competing and inconsistent stories. If officers were required to determine exactly where the truth lies before acting, the job of policing would be very risky financially as well as physically." *Id.* at 768-69 (citing *Askew v. City of Chicago,* 440 F.3d 894, 896 (7th Cir. 2006)). "Police would respond by disbelieving witnesses (or not acting on allegations) lest they end up paying damages, and the public would suffer as law enforcement declined." *Id.* Imposing monetary damages on public servants should be reserved for those instances of "plain incompetence" or "knowing violation of the law." *Malley*, 475 U.S. at 341. Here, the officers demonstrated neither. The court of appeals should be reversed.

CONCLUSION

It is well-established that officers can (and should) consider circumstantial evidence of mens rea at the probable cause stage and be given the latitude to discount a suspect's conflicting explanations when objectively reasonable to do so. There is no "clearly established" law to the contrary. The *Wesby* opinion contradicts this authority in so far as it directs officers to ignore circumstantial evidence of culpability or face personal liability in damages. To be clear, Amicus does not promote an "arrest first, ask questions later" approach. To the contrary, officers should be free to thoughtfully consider all of the evidence before them in

making an arrest, including circumstantial evidence of the requisite mental state. Because the *Wesby* opinion detours from this Court's qualified immunity analysis and conflicts with it and the decisions of courts throughout the United States, Amicus respectfully urges this Court to grant certiorari and summarily reverse.

DATED this 8th day of July, 2016.

Respectfully submitted,

KYMBERLY K. EVANSON
Counsel of Record
TANIA M. CULBERTSON
Pacifica Law Group LLP
1191 Second Ave.
Suite 2000
Seattle, WA 98101-3404
(206) 245-1700
Kymberly.Evanson@pacificalawgroup.com

CHARLES W. THOMPSON
Executive Director
International Municipal
Lawyers Association
7910 Woodmont Ave.
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

Counsel for Amicus Curiae
International Municipal
Lawyers Association

No. 15-1485

RECORD AND BRIEFS

In the
Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 11 2017
OFFICE OF THE CLERK

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

THEODORE WESBY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* *THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL LEAGUE OF CITIES; THE U.S. CONFERENCE OF MAYORS; THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS AND REVERSAL*

LISA SORONEN
STATE AND LOCAL
LEGAL CENTER
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845

JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
Post Office Box 7206
Reynolda Station
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

MAY 11, 2017

Counsel for Amici Curiae

*Gibson*Moore Appellate Services, LLC
206 East Cary Street • Richmond, VA 23219
804-249-7770 • www.gibsonmoore.net

Library of Congress

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE COURT BELOW'S HEIGHTENED PROBABLE CAUSE STANDARD WILL IMPEDE POLICE OFFICERS' ABILITIES TO DO THEIR JOBS 4

A. Probable cause requires deference to police officers when they have made on-the-scene judgment calls 4

B. The decision below will have negative practical effects on police officers' performance of their job duties 11

1. A heightened probable cause standard dissuades police officers from addressing suspected trespassers 11

2. A heightened probable cause standard harms police officers' decision-making abilities far beyond the scope of trespassing 14

II. THE MAJORITY'S QUALIFIED IMMUNITY ANALYSIS IGNORED THE ABSENCE OF CLEARLY ESTABLISHED LAW REQUIRING OFFICERS TO BELIEVE SUSPECTS' STATEMENTS 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s):

Cases:

Ahlers v. Schebil,
188 F.3d 365 (6th Cir. 1999) 10

Amobi v. D.C. Dep't of Corr.,
755 F.3d 980 (D.C. Cir. 2014) 10

Anderson v. Creighton,
483 U.S. 635 (1987) 18

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 18

Brinegar v. United States,
338 U.S. 160 (1949) ..... *passim*

Cox v. Hainey,
391 F.3d 25 (1st Cir. 2004) 5

Criss v. City of Kent,
867 F.2d 259 (6th Cir. 1988) 9

Davis v. United States,
564 U.S. 229 (2011) 19

Feldman v. Cmty. Coll. of Allegany,
85 F. App'x 821 (3d Cir. 2004) 6

Florida v. Harris,
133 S. Ct. 1050 (2013) 4, 6, 9

Gerstein v. Pugh,
420 U.S. 103 (1975) 6

Graham v. Connor,
490 U.S. 386 (1989) 8

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 18

Illinois v. Gates,
462 U.S. 213 (1983).....4, 7, 9

Krause v. Bennett,
887 F.2d 362 (2d Cir. 1989).....14, 15

Maney v. Garrison,
No. 14-7791, 2017 WL 937460
(4th Cir. Mar. 9, 2017).....8

Maryland v. Buie,
494 U.S. 325 (1990).....7

Merkle v. Upper Dublin Sch. Dist.,
211 F.3d 782 (3d Cir. 2000).....9

Plumhoff v. Rickard,
134 S. Ct. 2012 (2014).....8, 18, 19

Ricciuti v. N.Y.C. Transit Auth.,
124 F.3d 123 (2d Cir. 1997).....10

Ryburn v. Huff,
565 U.S. 469 (2012).....8

State v. Maxwell,
699 So.2d 512 (La. App. 4 Cir. 1997).....15

State v. McKnight,
737 So.2d 218 (La. App. 4 Cir. 1999).....15

Taylor v. Barkes,
135 S. Ct. 2042 (2015).....19

Terry v. Ohio,
392 U.S. 1 (1968).....6, 7

United States v. Arvizu,
534 U.S. 266 (2002).....5, 6

United States v. Cortez,
449 U.S. 411 (1981).....4

United States v. Heitner,
149 F.2d 105 (2d Cir. 1945) 12

United States v. Sharpe,
470 U.S. 675 (1985) 8

United States v. Sokolow,
409 U.S. 1 (1989) 7

Wesby v. District of Columbia,
816 F.3d 96 (D.C. Cir. 2016) 9, 11, 18, 19

Wright v. City of Philadelphia,
409 F.3d 595 (3d Cir. 2009) 5, 9

Statute:

26 U.S.C. § 501(c)(4) 2

Other Authorities

Andrea Clark,
Amidst the Walking Dead: Judicial and Nonjudicial Approaches for Eradicating Zombie Mortgages,
65 EMORY L.J. 795 (2016) 12

Aria Bendix,
U.S. Naval and Military Academies See Rise in Sexual Assault, ATLANTIC (Mar. 16, 2017),
https://www.theatlantic.com/education/archive/2017/03/us-naval-and-military-academies-see-rise-in-sexual-assault/519912/ 17

Don Walker,
Hundreds of Zombie Homes Plague Milwaukee Neighborhoods,
MILWAUKEE J. SENTINEL (May 25, 2014),
http://www.jsonline.com/news/Milwaukee/hundreds-of-zombie-homes-plague-milwaukee-neighborhoods-b99276701z1-260613161.html) 12

Galligan D.,
Regulating Pre-trial Decisions, in
A READER ON CRIMINAL JUSTICE
151 (Lacey N., ed. 1994) 6

James Queally,
Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear in Immigrant Communities, LAPD says, L.A. TIMES (Mar. 21, 2017, 8:25 PM), https://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html 16

Joanna C. Schwartz, *Police Indemnification*,
89 N.Y.U. L. REV 885 (2014) 20

Kathleen C. Engel,
Local Governments and Risky Home Loans,
69 SMU L. REV. 609 (2016) 12

Matthew Connelly,
Rejecting Federal Preference: Why Courts Should Not Exempt Fannie Mae and Freddie Mac Properties From Cities' Vacant Property Registration Ordinances,
49 WASH. U. J.L & POL'Y 181 (2015).....13

Melanie Randall,
Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law,
23 ST. LOUIS U. PUB. L. REV. 107 (2004) 16

Melissa Korn,
Reports of Sexual Assault Rising Sharply on College Campuses,
WALL STREET J. (May 4, 2016, 1:19 PM),
https://www.wsj.com/articles/reports-of-sexual-assault-rising-sharply-on-college-campuses-1462375421 17

Ray Sanchez,
Stanford Rape Case: Inside the Court Documents,
CNN, http://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/
(last updated June 11, 2016, 5 PM) 17

Robert Hennelly,
America's Foreclosure Crisis Isn't Over,
CBS NEWS (Jan. 26, 2016, 5:00 AM),
https://www.cbsnew.com/news/americas-foreclosure-crisis-isnt-over/ 12

Samantha Schmidt,
Police Knew About Illegal Housing, Parties at Oakland Warehouse Before Fire That Killed 36, but Took No Action, WASH. POST (Feb. 9, 2017),
https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/police-knew-about-illegal-housing-parties-at-oakland-warehouse-before-deadly-fire-but-took-no-action/?utm_term=.4f9faac0de 13

Simon Bronitt & Philip Stenning,
Understanding Discretion in Modern Policing,
35 CRIM. L.J. 319 (2011) 6

Thomas Fuller et al.,
Why the 'Ghost Ship' was Invisible in Oakland, Until 36 Died, N.Y. TIMES (Dec. 22, 2016),
https://www.nytimes.com/2016/12/22/us/why-the-ghost-ship-was-invisible-in-oakland-until-36-died.html.....13

INTEREST OF AMICI CURIAE[1]

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes more than 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

---

[1] This brief was prepared by counsel for amici and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National Sheriffs' Association (Association), a 26 U.S.C. § 501(c)(4) non-profit organization, was formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States and to promote, to protect, and to preserve our nation's Departments/Offices of Sheriff. The Association has more than 21,000 members and is a strong advocate for more than 3,000 individual sheriffs located throughout the United States. More than 99% of our Nation's Departments/Offices of Sheriff are directly elected by the people in their local counties, cities, or parishes. The Association promotes the public interest goals and policies of law enforcement in our Nation, and it participates in judicial processes (such as this case) where the vital interests of law enforcement and its members are at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

Police officers encounter numerous situations that require split-second decision-making. This Court has consistently assessed police officers' decisions to search and arrest under a flexible probable cause standard that gives deference to the officers' experience and expertise. The majority below deviated from this standard by applying a rigid rule that officers must believe a suspect's statements, even when circumstantial evidence indicates otherwise. This heightened probable cause standard sharply contrasts with the public interest in deferring to police officers on-the-spot judgment calls. In particular, this standard denies police officers the discretion to weigh the circumstantial evidence at a crime scene, including how much credence to give a suspect's statement. Ultimately, the court below's heightened probable cause standard would create a chilling effect on officers' willingness to make necessary arrests both within and beyond the context of trespassing.

Further, the court below's highly generalized framing of Respondents' right is exactly the type of construction this Court forbids in analyses of the clearly established prong of qualified immunity. Under an appropriate framing, there was no clearly established law that an officer must believe suspects' statements alleging innocence. To hold otherwise would run contrary to this Court's prohibition against retroactively punishing police officers and would place a heavy financial burden on local governments.

ARGUMENT

I. THE COURT BELOW'S HEIGHTENED PROBABLE CAUSE STANDARD WILL IMPEDE POLICE OFFICERS' ABILITIES TO DO THEIR JOBS.

Rather than following this Court's case-by-case, flexible probable cause standard, the majority below applied a heightened standard that does not give deference to police officers' expertise and judgment. This new standard fails to strike the appropriate balance between ensuring public safety and protecting individuals' privacy rights, and it should therefore be reversed.

A. Probable cause requires deference to police officers when they have made on-the-scene judgment calls.

Probable cause deals with probabilities that "are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *see also Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013); *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983). Probable cause is not a standard that courts should compact into specific, rigid legal rules. *See Gates*, 462 U.S. at 231-32.

Viewed from this practical standpoint, probable cause permits police officers to "formulate[] certain common-sense conclusions about human behavior." *United States v. Cortez*, 449 U.S. 411, 418 (1981). Police officers are allowed, and encouraged, "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might

well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *see also Cox v. Hainey*, 391 F.3d 25, 32 (1st Cir. 2004) (deferring to the officer's reasonable decision to arrest despite the availability of "alternative inferences" that cut against the suspect's guilt). Officers confront many situations—some incredibly dangerous—far removed from the day-to-day encounters of the average layperson. Probable cause grants officers the necessary latitude to make on-the-spot determinations that hinge on their knowledge and expertise.

This Court has noted that granting "fair leeway" to police officers to enforce the law and protect communities is an appropriate counterbalance to "safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Brinegar*, 338 U.S. at 176. In balancing these opposing interests, courts should recognize that the practical conception of probable cause provides room for police officers to make mistakes. *See id.* Police officers are not perfect and are confronted with countless situations that are "more or less ambiguous." *Id.* Thus, probable cause does not force officers to adhere to a strict legal standard, but rather allows officers to use their knowledge to make reasonable judgment calls. *See, e.g.*, *Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2009) (determining that although the officers made a potential mistake, their decision to discredit plaintiff's explanation "was not unreasonable in light of the information the officers possessed at the time").

The inherent flexibility of probable cause further stems from this Court's recognition that police officers' on-the-spot determinations are held to a far lower standard of proof than convictions. *See Harris*, 133 S. Ct. at 1055; *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975). The split-second decision-making expected of police officers does "not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands." *Gerstein*, 420 U.S. at 121; *see also Feldman v. Cmty. Coll. of Allegany*, 85 F. App'x 821, 826 (3d Cir. 2004) (noting it is without question that officers are "not required or permitted to conduct a trial of the matter on the spot" (citation omitted)). Police officers serve their communities by making fact determinations at the scene of a suspected crime.

It follows that the probable cause standard should give police officers some discretion when they confront on-the-spot credibility determinations. *See, e.g.*, *Arvizu*, 534 U.S. at 273; *Brinegar*, 338 U.S. at 175. Assessing the credibility of witnesses and suspects at the scene is imperative for police officers to determine "whether to investigate, to question, to search, to arrest, to caution, to charge, [or] to prosecute."[2] Police officers' unique training and experience make them the only qualified individuals to conduct credibility assessments on the scene.

Giving police officers discretion in making on-the-spot credibility determinations is also consistent with this Court's analysis of *Terry* stops under the

---

[2] Simon Bronitt & Philip Stenning, *Understanding Discretion in Modern Policing*, 35 CRIM. L.J. 319, 320 (2011) (quoting Galligan D., *Regulating Pre-trial Decisions, in* A READER ON CRIMINAL JUSTICE 151, 151 (Lacey N., ed. 1994)).

reasonable suspicion standard. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that a police officer can stop and briefly detain an individual for investigatory purposes if the officer has reasonable suspicion of criminal activity). Like probable cause, this Court views reasonable suspicion as a concept not "readily, or even usefully, reduced to a neat set of legal rules." *United States v. Sokolow*, 409 U.S. 1, 7 (1989) (quoting *Gates*, 462 U.S. at 232).

Terry stops are subjected to the reasonable suspicion standard because these investigatory stops embody a key aspect of a police officer's job—taking "swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry*, 392 U.S. at 20; *see also Maryland v. Buie*, 494 U.S. 325, 331-32 (1990). As a practical matter, officers must have discretion to act on their on-the-spot observations because there is no time to acquire search warrants for on-the-street frisks. *Terry*, 392 U.S. at 20. Similarly, when officers are facing the decision to arrest under the probable cause standard, they often have no time to obtain an arrest warrant. This holds particularly true in incidents involving alleged domestic violence where the risk of harm could escalate, possession of drugs where a suspect could destroy evidence or fabricate an explanation, and trespassing where the suspected trespassers could further damage the homeowner's property or flee.

A flexible probable cause standard is also consistent with the reasonableness standard used in evaluating excessive force claims. Determining the constitutionality of an officer's use of force requires courts to ask whether the force was objectively

reasonable from the perspective of a reasonable officer on the scene. *Graham v. Connor*, 490 U.S. 386, 396 (1989). In analyzing excessive force cases, this Court has repeatedly noted that the reasonableness standard must account for "the fact that police officers are often forced to make split-second judgments—in circumstances that are often tense, uncertain, and rapidly evolving." *Id.*; *see also Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014); *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). If officers are required "to intervene at a moment's notice . . . on the basis of imperfect information and with little time for deliberation," courts must give officers the deference they deserve. *Maney v. Garrison*, No. 14-7791, 2017 WL 937460, at *3 (4th Cir. Mar. 9, 2017).

In the excessive force context, this Court praised one lower court's "wise admonition that judges should be cautious in second guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn*, 565 U.S. at 477; *see also United States v. Sharpe*, 470 U.S. 675, 686 (1985) (noting that courts should not "indulge in unrealistic second-guessing" where police acted in "a swiftly developing situation"). This admonition is just as wise when analyzing police officers' on-the-scene credibility determinations under the probable cause standard, and courts should thus be equally wary of relying on "hindsight and calm deliberation" when reviewing a police officer's judgment in these situations. *Id.*

In evaluating whether a police officer has met the "common-sensical standard" of probable cause, this Court has continually looked to the totality of the

circumstances. *Harris*, 133 S. Ct. at 1055; *Gates*, 462 U.S. at 232, *Brinegar*, 338 U.S. at 176. A totality of the circumstances analysis aligns with this Court's view of probable cause as a "more flexible, all-things-considered approach." *Harris*, 133 S. Ct. at 1055. As first responders to the scene of an alleged crime, police officers are in the best position to weigh and balance the evidence before them in determining whether probable cause exists. *See Gates*, 462 U.S. at 232 ("[T]he evidence . . . collected must be seen and weighed . . . as understood by those versed in the field of law enforcement.").

Suspects' statements are but one factor in the totality of the circumstances analysis. Although a police officer may give weight to a suspect's statement, a suspect's denial of guilt alone should not preclude probable cause. *See Wright*, 409 F.3d at 603 ("Although [the suspect's] explanation for entering [the] residence is a factor in the probable cause analysis, it is not dispositive."). It is undisputed that officers are not required to believe a suspect's innocent explanation in determining probable cause. *See Wesby v. District of Columbia*, 816 F.3d 96, 97 (D.C. Cir. 2016) (Pillard, J., concurring) (agreeing with Judge Kavanaugh's dissent that "officers are not required to take suspects at their word when they deny their guilt"). Moreover, police officers are "under no obligation to give any credence to a suspect's story," if the officers have already established probable cause. *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988); *see also Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 790 n.8 (3d Cir. 2000) (noting officers are not required to "undertake an exhaustive investigation in order to validate the

probable cause that, in [their minds], already exists"); *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999) ("Once probable cause is established, an officer is under no duty to investigate further.").

Given the demands of an officer's job duties, it is not practical to expect an officer to "explore and eliminate every theoretically plausible claim of innocence before making an arrest," *Amobi v. D.C. Dep't of Corr.*, 755 F.3d 980, 990 (D.C. Cir. 2014) (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997)). Such an exploration would give inappropriate weight to a suspect's statements. Giving a suspect's statement greater weight than other factors would in turn "allow every suspect, guilty or innocent, to avoid arrest simply by claiming 'it wasn't me.'" *Id.*

In direct contradiction to the inherent flexibility of probable cause, the majority decision below requires police officers to adhere to a rigid rule: absent conflicting information, police officers must believe the statements of alleged suspects, even when the officers have reason to doubt the suspects' credibility. Such a rule directly opposes this Court's emphasis on allowing police officers to rely on their unique experience and training to make determinations at the scene of a suspected crime.

The decision below allows the suspects' explanations for their presence on the property to preclude probable cause despite circumstantial evidence indicating the opposite. This hindsight analysis invites a level of second-guessing that undermines police officers' ability to do their jobs in real time. Courts should recognize that police officers

engage in credibility determinations "far removed from the serenity and unhurried decision making of an appellate judge's chambers." *Wesby*, 816 F.3d at 106 (Kavanaugh, J., dissenting). Given the vast disparity between suspected crime scenes and courtrooms, police officers should be accorded deference in the credibility determinations they make on the spot.

B. The decision below will have negative practical effects on police officers' performance of their job duties.

By heightening the probable cause standard, the majority has set a rigid precedent that will chill police officers from making difficult judgment calls. Discouraging police from relying on their own credibility determinations will have negative repercussions in the context of future trespassing cases as well as a range of other crimes, which will negatively affect public safety.

1. A heightened probable cause standard dissuades police officers from addressing suspected trespassers.

This Court has noted that probable cause affords "the best compromise" for accommodating the opposing interests of suspects and law enforcement. *Brinegar*, 338 U.S. at 175. Requiring officers to credit suspects' explanations over contrary circumstantial evidence upsets this balance and "unduly hampers law enforcement." *See id.* If officers are not afforded the breathing room required to make on-the-spot decisions, then they may avoid making such imperative decisions at all.

A heightened probable cause standard would chill law enforcement officers from relying on their experience to where "they cannot possibly perform their duties." *United States v. Heitner*, 149 F.2d 105, 106 (2d Cir. 1945). If a police officer knows his decision will be judged under a heightened probable cause standard, he is less likely to make the judgment calls (e.g. arresting a suspect) necessary to initiate an investigation. This hesitation to make urgent decisions places the public at increased risk and wastes time and resources.

Officer hesitation is particularly problematic in the context of trespassing and related property crimes given the persistence of post-recession vacant properties.[3] Foreclosed homes, or "Zombie homes," plague their surrounding neighborhoods as they "invite trespassers" and are "magnets for crime and drug use."[4] As "havens for criminal activity," vacant homes "require increased police presence to respond

---

[3] *See* Robert Hennelly, *America's Foreclosure Crisis Isn't Over*, CBS NEWS (Jan. 26, 2016, 5:00 AM), https://www.cbsnew.com/news/americas-foreclosure-crisis-isnt-over/ (noting that certain geographical areas are still recovering from the housing crisis).

[4] Kathleen C. Engel, *Local Governments and Risky Home Loans*, 69 SMU L. REV. 609, 629 (2016); *see also* Andrea Clark, *Amidst the Walking Dead: Judicial and Nonjudicial Approaches for Eradicating Zombie Mortgages*, 65 EMORY L.J. 795, 804 (2016) (quoting Don Walker, *Hundreds of Zombie Homes Plague Milwaukee Neighborhoods*, MILWAUKEE J. SENTINEL (May 25, 2014), http://www.jsonline.com/news/Milwaukee/hundreds-of-zombie-homes-plague-milwaukee-neighborhoods-b99276701z1-260613161.html).

to [the] higher crime rates."[5] A heightened probable cause standard where police officers must heavily rely on a suspected trespasser's explanation for his presence in a seemingly vacant home will inhibit police officers' ability to prevent future trespassing and the consequences that follow.

When police officers hesitate to take action, the possibility for future disasters increases. In December 2016, the Oakland Ghost Ship Fire—"America's deadliest structural fire in more than a decade"—resulted in thirty-six deaths stemming from multiple code violations, including illegal occupancy.[6] Before this horrific event, police officers received neighbors' complaints about an illegal "rave," involving drugs and alcohol, occurring within the warehouse.[7] After arriving on the scene, officers did not make any arrests or issue citations "despite the warehouse not being licensed as a cabaret" in

---

[5] Matthew Connelly, *Rejecting Federal Preference: Why Courts Should Not Exempt Fannie Mae and Freddie Mac Properties From Cities' Vacant Property Registration Ordinances*, 49 WASH. U. J.L & POL'Y 181, 185-86 (2015).

[6] Thomas Fuller et al., *Why the 'Ghost Ship' was Invisible in Oakland, Until 36 Died*, N.Y. TIMES (Dec. 22, 2016), https://www.nytimes.com/2016/12/22/us/why-the-ghost-ship-was-invisible-in-oakland-until-36-died.html.

[7] Samantha Schmidt, *Police Knew About Illegal Housing, Parties at Oakland Warehouse Before Fire That Killed 36, but Took No Action*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/police-knew-about-illegal-housing-parties-at-oakland-warehouse-before-deadly-fire-but-took-no-action/?utm_term=.4f9faac0de.

accordance with the city's ordinances.[8] Outcomes like the Oakland Ghost Ship Fire will only become more prevalent if officers must fear personal liability every time they make an arrest.

2. A heightened probable cause standard harms police officers' decision-making abilities far beyond the scope of trespassing.

The majority below's heightened probable cause standard would impede officers' ability to make arrests in criminal cases in contexts other than trespassing. Crimes involving stolen property, drug possession, domestic abuse, and sexual assault, for example, often require police officers to make on-the-spot judgment calls to determine the best next steps. Such crimes also commonly involve suspects who are likely to have an innocent explanation at the ready. If officers are expected to take suspects at their word and trust any feasible narrative of innocence, guilty actors can and will avoid arrest simply by proffering a creative excuse.

Possession of stolen property is one crime where the decision below could easily undermine an officer's determination of probable cause. In *Krause v. Bennett*, 887 F.2d 362 (2d Cir. 1989), a man suspected of possessing a stolen stop sign informed the investigating officer that he received it from a friend for whom he had done plumbing work—which suggested that plaintiff did not *knowingly* possess stolen property. *Id.* at 365. The Second Circuit, however, correctly concluded that the suspect's

---

[8] *Id.*

innocent explanation did not negate the officer's finding of probable cause and arrest. *Id.* at 371. The court emphasized that "[i]t would be unreasonable and impractical to require that every innocent explanation of activity that suggests criminal behavior to be proved wrong, or even contradicted, before an arrest warrant could be issued with impunity." *Id.* at 372.

The Second Circuit's reasoning highlights a major problem with the decision below. Had the officer in *Krause* not been allowed to make an arrest until he had corroborative evidence of every element of the crime, the investigation could have been significantly delayed, and evidence of the stolen property could have been destroyed or abandoned.

Similarly, suspects in drug crimes are unlikely to admit knowledge. Imagine that a police officer stops someone for a minor traffic violation and notices a crack pipe sitting in plain sight on the vehicle's floor. From her vantage point the officer also observes white residue on the exterior of the pipe, which she suspects is cocaine. Typically, an individual in possession of cocaine is reluctant to admit he or she *knowingly* possesses the drug. *See, e.g*, *State v. McKnight*, 737 So.2d 218, 218 (La. App. 4 Cir. 1999); *State v. Maxwell*, 699 So.2d 512, 513 (La. App. 4 Cir. 1997). While it would seem that the officer has probable cause for arrest, under the decision below the suspect could potentially thwart such an outcome simply by saying "My friend must have left that pipe in my car. I've never seen it before." The excuse is feasible and, if true, negates the suspect's knowing possession of cocaine.

A heightened probable cause standard could also have devastating consequences in situations involving violent crimes, where arrest may be vital to public safety. Domestic abuse is one such example. Consider a scenario wherein a police officer receives a call from a concerned citizen who hears yelling and other noises indicating a physical struggle coming from his neighbor's apartment. When the police officer arrives on the scene, she observes some strewn furniture. Although the spouse and child seem shaken and anxious, neither admits to any abuse or violent activity upon questioning (a common response even when domestic abuse has actually occurred[9]). Does the officer have probable cause to arrest the suspected abuser based on her circumstantial observations? Under the majority decision below, the answer is, at best, unclear. At worst, the answer is no, and an officer could be constitutionally required to leave the woman and child in a dangerous and abusive situation.

---

[9] *See* Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 136–37 (2004); *see also* James Queally, *Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear in Immigrant Communities, LAPD says*, L.A. TIMES (Mar. 21, 2017, 8:25 PM), https://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html (noting that domestic violence and sexual assault reports among Los Angeles' Latino community have significantly dropped under President Trump's administration due to fear of deportation). A decline in reporting further compounds the difficulty police officers face when making credibility assessments at the scene of a suspected domestic violence incident.

Another troubling possibility involves police officers' ability to intervene in cases of sexual assault the reported instance of which has dramatically increased in some communities in recent years.[10] In the highly publicized Stanford rape case, police officers arrived at the crime scene to find two men restraining the assailant, Brock Turner.[11] The two bystanders claimed they found Turner sexually assaulting the victim behind a nearby dumpster. Turner maintained the victim consented to the sexual conduct. The responding police officers arrested Turner at the scene, and Turner was eventually convicted of multiple counts of rape and sexual assault. It seems clear that the officers acted properly, but the majority's holding below could very well act to deter such action in future cases. If a suspect claims that he received consent from his alleged victim, how much evidence must officers proffer at the scene to negate the innocent explanation and establish probable cause for arrest? Trained officers are best equipped to make such judgment calls, but they are unlikely to do so if a high probable cause standard turns one mistake into a million-dollar liability risk.

---

[10] Aria Bendix, *U.S. Naval and Military Academies See Rise in Sexual Assault*, ATLANTIC (Mar. 16, 2017), https://www.theatlantic.com/education/archive/2017/03/us-naval-and-military-academies-see-rise-in-sexual-assault/519912/; Melissa Korn, *Reports of Sexual Assault Rising Sharply on College Campuses*, WALL STREET J. (May 4, 2016, 1:19 PM), https://www.wsj.com/articles/reports-of-sexual-assault-rising-sharply-on-college-campuses-1462375421.

[11] Ray Sanchez, *Stanford Rape Case: Inside the Court Documents*, CNN, http://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/ (last updated June 11, 2016, 5 PM).

II. The Majority's Qualified Immunity Analysis Ignored The Absence Of Clearly Established Law Requiring Officers To Believe Suspects' Statements.

Qualified immunity shields police officers from liability when their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When there is no clearly established right "at the time of the challenged conduct," a plaintiff cannot overcome a qualified immunity defense. *Plumhoff*, 134 S. Ct. at 2023.

For a right to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In contrast, a right is not clearly established when it is construed at a "high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). The majority's framing of Respondents' right—to be free from arrest unless an officer can show probable cause for "each of the necessary elements of the offense"—is exactly the highly generalized construction that this Court prohibits.

The appropriate framing of Respondents' right is whether, as suspected criminals, their proffered excuse precludes probable cause for arrest. *See Wesby v. District of Columbia*, 816 F.3d 96, 110 (2016) (Kavanaugh, J., dissenting). There is no clearly established law that officers must believe suspects' statements, excuses, or explanations. *Id.*

Therefore, the officers in this case should be free from liability under the qualified immunity doctrine, even if this Court were to adopt the majority below's probable cause holding.

Any other result would clash with this Court's emphasis against retroactively punishing police officers for otherwise reasonable conduct. *See, e.g.*, *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (explaining that before officers are to be found liable, they must be put "on notice of any possible constitutional violation"); *Plumhoff*, 134 S. Ct. at 2023 (cautioning against using later-decided cases because those cases "could not have given fair notice" to the officer (internal quotation omitted)), *see also Davis v. United States*, 564 U.S. 229, 241 (2011) (expanding the good-faith exception by reasoning that when evidentiary exclusion only deters "conscientious police work," it should not be applied).

Here, the decision below awarded more than $1 million in damages and fees for two police officers' "on-the-spot decision to make . . . trespassing arrests." *Wesby*, 816 F.3d at 112 (Kavanaugh, J., dissenting). Given the absence of clearly established law on point, this award inappropriately punishes the police officers for an action that they had no reason to believe was illegal and chills performance of on-the-scene duties for all officers in the future.

Local governments and municipalities share equally in the severe consequences stemming from the decision below. The burden of paying liability damages and litigation fees typically falls on local

governmental entities.[12] One study of forty-four jurisdictions found that government funds paid for "an estimated $735,270,772 in settlements and judgments involving civil rights claims on behalf of their law enforcement officers between 2006 and 2011."[13] The majority's holding would place an additional financial burden on local governments that will have to pay for police officers' otherwise reasonable on-the-spot determinations.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

/s/ JOHN J. KORZEN

LISA SORONEN
STATE AND LOCAL
LEGAL CENTER
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845

JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY
CLINIC
Post Office Box 7206
Reynolda Station
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

MAY 11, 2017

Counsel for Amici Curiae

---

[12] *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV 885 (2014) (examining the widespread indemnification involved in police officer disputes).

[13] *Id.* at 913.

RECORD
AND
BRIEFS

No. 15-1485

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE STATE OF UTAH AND TWENTY-FIVE OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
**Counsel of Record*
KYLE J. KAISER
MEB W. ANDERSON
Assistant Attorneys General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov

Counsel for Amicus Curiae State of Utah

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

TABLE OF CONTENTS

	Page
STATEMENT OF *AMICI CURIAE* INTEREST ...	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. Petitioners Had Probable Cause To Arrest Respondents For Trespassing In The Vacant House	5
A. The Totality Of The Circumstances – Including Petitioners' Inferences From Available Facts – Established Probable Cause For Respondents' Arrests	5
B. In Assessing Probable Cause, Officers Can Rely On Reasonable Inferences That Contradict A Suspect's Claims Of An Innocent Mental State	10
II. Qualified Immunity Shields Petitioners From Liability For Arresting Respondents In The Vacant House	15
A. Petitioners' Conclusion That Probable Cause Supported Respondents' Arrests Was Objectively Reasonable, Even If Mistaken	16
B. The Cases That Squarely Govern Petitioners' Conduct Did Not Put Them On Notice That Respondents' Arrests In The Vacant House Violated Clearly Established Law	22
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Adams v. Williams, 407 U.S. 143 (1972) 7, 9

Anderson v. Creighton, 483 U.S. 635 (1987) ..... *passim*

Artisst v. United States, 554 A.2d 327 (D.C. 1989) ... 2, 24

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 1, 22, 23

Baker v. McCollan, 443 U.S. 137 (1979). 7

Beck v. Ohio, 379 U.S. 89 (1964) 6

Borgman v. Kedley, 646 F.3d 518 (8th Cir. 2011) 19, 20, 21

Brigham City v. Stuart, 547 U.S. 398 (2006) 7

City & Cnty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765 (2015) 23

Commonwealth v. Brown, No. 1394-15-2, 2016 WL 308584 (Va. Ct. App. Jan. 26, 2016) 14

Culp v. United States, 486 A.2d 1174 (D.C. 1985) 3

Finigan v. Marshall, 574 F.3d 57 (2d Cir. 2009) 19

Florida v. Harris, 133 S. Ct. 1050 (2013) 1, 6, 7, 9, 10

Garcia v. Jane & John Does 1-40, 779 F.3d 84 (2d Cir. 2015) 16, 18

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 7, 17

Hunter v. Bryant, 502 U.S. 224 (1991) 6, 8, 16, 17

Illinois v. Wardlow, 528 U.S. 119 (2000) 9

Locke v. United States, 11 U.S. (7 Cranch) 339 (1813) 10

TABLE OF AUTHORITIES – Continued

Page

Luzzi v. Hirsch, No. 3:10CV481, 2011 WL 6780968 (D. Conn. Oct. 20, 2011) 21

McGloin v. United States, 232 A.2d 90 (D.C. 1967) 2, 24

Newsome v. Whitaker, No. Civ.A.03-3182, 2005 WL 525398 (E.D. Pa. Mar. 4, 2005).....21

Ornelas v. United States, 517 U.S. 690 (1996) 6, 11, 12

Painter v. City of Albuquerque, 383 F. App'x 795 (10th Cir. 2010).....19, 21

Pearson v. Callahan, 555 U.S. 223 (2009) 15, 22

Pennsylvania v. Dunlap, 129 S. Ct. 448 (2008).....9

Pierson v. Ray, 386 U.S. 547 (1967).....16

Ramirez v. City of Buena Park, 560 F.3d 1012 (9th Cir. 2009).....24

Reichle v. Howards, 132 S. Ct. 2088 (2012).....23

Sennett v. United States, 667 F.3d 531 (4th Cir. 2012) 23

Stanton v. Sims, 134 S. Ct. 3 (2013).....24

United States v. Cortez, 449 U.S. 411 (1981)....6, 11, 12

Wesby v. Dist. of Columbia, 816 F.3d 96 (D.C. Cir. 2016) .....*passim*

Wesby v. Dist. of Columbia, 765 F.3d 13 (D.C. Cir. 2014) 5, 10, 11, 12, 17

White v. Pauly, 137 S. Ct. 548 (2017).....22

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 3, 7, 22

STATUTES

Ala. Code § 13A-7-2(a) 13

Ariz. Rev. Stat. Ann. § 13-1504(A)(1) 13

Ark. Code Ann. § 5-39-203(a)(2) 14

Colo. Rev. Stat. § 18-4-502 13

Conn. Gen. Stat. § 53a-108(a) 13

D.C. Code § 22-3302 ..... 2, 8

Del. Code Ann. tit. 11, § 822 13

Fla. Stat. Ann. § 810.08(1) 13

Ga. Code Ann. § 16-7-21(b)(1) 13

Haw. Rev. Stat. § 708-813(1)(a) 13

Ind. Code § 35-43-2-2(b)(5)(B) 13

720 Ill. Comp. Stat. 5/21-3(a)(1) 13

Kan. Stat. Ann. § 21-5808(a)(1) 13

Ky. Rev. Stat. Ann. § 511.060(1) 13

Me. Rev. Stat. tit. 17-A, § 402 13

Miss. Code Ann. § 97-17-93(1) 13

Mo. Rev. Stat. § 569.140(1) 13

Mont. Code Ann. § 45-6-203(1) 13

N.D. Cent. Code § 12.1-22-03(1) 13

TABLE OF AUTHORITIES – Continued

Page

N.H. Rev. Stat. Ann. § 635:2(I) 13

N.J. Stat. Ann. § 2C:18-3(a) 13

N.M. Stat. Ann. § 30-14-1(A) 13

N.Y. Penal Laws § 140.15(1) 13

Neb. Rev. Stat. § 28-520(1)(a) 13

Ohio Rev. Code Ann. § 2911.21(A)(1) 13

18 Pa. Cons. Stat. § 3503(a)(1)(i) 13

S.D. Codified Laws § 22-35-5 13

W. Va. Code § 61-3B-2 13

Wash. Rev. Code § 9A.52.070(1) 13

Wis. Stat. § 943.14 14

Wyo. Stat. Ann. § 6-3-303(a) 13

RULES

Fed. R. Civ. P. 56 18

OTHER AUTHORITIES

Model Penal Code § 221.2 13

STATEMENT OF *AMICI CURIAE* INTEREST

The Court of Appeals' decision contradicts this Court's settled precedent on probable cause and on qualified immunity. The *amici* States have a pronounced interest in securing a decision from this Court that corrects those errors because accurate precedent on both doctrines is indispensable to the States' efforts to effectively enforce their laws.

Decisions that incorrectly apply the doctrine of probable cause hinder law enforcement officers' ability to stop crime and protect the public. *See Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). And decisions that improperly narrow the qualified immunity defense shrink the "breathing room" this Court has given State officials to govern and act when only opaque law guides their conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Police officers in particular – who often must make difficult decisions in stressful, dangerous circumstances – "should no more be held personally liable in damages than should" other State officials when those officers' judgments "are objectively legally reasonable." *Anderson v. Creighton*, 483 U.S. 635, 644 (1987).

Unfortunately the Court of Appeals' decision does just that. Its judgment should be reversed.

SUMMARY OF ARGUMENT

In 1901, Clark Gable and Walt Disney were born. The Ottoman dynasty still had more than 20 years left in its reign. And the District of Columbia passed a criminal trespass statute making it a misdemeanor for "[a]ny person . . . without lawful authority" to "enter, or attempt to enter, any . . . private dwelling . . . against the will of the lawful occupant" – a prohibition that remained unchanged for more than 100 years, *see* D.C. Code § 22-3302 (2008).

Since then, Washington D.C. courts have interpreted the criminal trespass statute to "clearly *permit[ ]* police officers to arrest a person for trespassing even when that person claims to have the right to be on the property, if a reasonable officer could disbelieve the suspected trespasser." *Wesby v. Dist. of Columbia*, 816 F.3d 96, 111 (D.C. Cir. 2016) (*Wesby II*) (Kavanaugh, J., dissenting from den. of reh'g en banc); *see also id.* at 109 (citing *Artisst v. United States*, 554 A.2d 327 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90 (D.C. 1967)).

In other words, when the events giving rise to this case occurred, the black-letter law in the District of Columbia for more than 100 years had been that where "an officer observes a person inside a vacant building, the officer has reason to believe that person does not belong there, and the property itself reveals indications of a continued claim of possession by the owner

or manager, there is probable cause to arrest for unlawful entry." *Culp v. United States*, 486 A.2d 1174, 1177 (D.C. 1985).

In accordance with that more than century's worth of precedent, Petitioners[1] arrested Respondents for trespassing in a vacant home well past midnight one Sunday morning after confirming with the home's owner that Respondents had no right to be there. The District of Columbia eventually decided not to press charges. Respondents then sued Petitioners under 42 U.S.C. § 1983. They contended, as relevant, that Petitioners violated their Fourth Amendment rights by arresting them. The federal district court rejected Petitioners' contention that probable cause supported the arrests and denied their requests for qualified immunity. It granted summary judgment to Respondents instead, and after a trial, awarded damages jointly against the District and the officers personally in an amount that now exceeds $1 million (including fees). The D.C. Circuit affirmed that judgment in a 2-1 decision and denied Petitioners' request for rehearing en banc over the dissent of four judges.

The Court of Appeals' judgment must be reversed. Its first error is its holding that Respondents' arrests were not supported by probable cause. It justified that holding only by improperly excluding Petitioners'

---

[1] Unless otherwise stated, *amici* use the term "Petitioners" in this brief to refer to Officers Parker and Campanale, exclusive of the District of Columbia itself.

inferences of Respondents' guilt – based on their experience and training – from the totality of the circumstances Petitioners could have considered. Excising Petitioners' inferences was necessary, it concluded, because Respondents had offered excuses for their presence in the vacant home that contradicted them. The resulting rule: When a suspect offers an innocent explanation for his conduct, an officer's contradictory inferences of a suspect's guilt *cannot by themselves* support probable cause to arrest. That rule cannot be reconciled with this Court's probable-cause precedent.

The Court of Appeals also misapplied this Court's qualified immunity cases. It held that Petitioners lacked even *arguable* probable cause – a holding driven by the court's erroneous view that an officer must *subjectively disbelieve* a suspect's proffered excuse before considering that excuse as part of the totality of the circumstances. This reasoning contradicts the well-established rule that review of an arguable probable cause conclusion in a qualified immunity case is *objective*, not *subjective*; the officers' subjective beliefs about the suspect's intent are irrelevant. And even if that view of the law about arguable probable cause were correct, it had never before been applied in any American court, so it was not clearly established when Petitioners arrested Respondents. But the Court of Appeals likewise rejected Petitioners' request for qualified immunity on that basis – continuing the regrettable trend among the courts of appeals of applying a newly created rule retroactively to strip State officials of qualified immunity.

Each of those errors justifies – indeed, requires – reversing the Court of Appeals' judgment.

ARGUMENT

I. Petitioners Had Probable Cause To Arrest Respondents For Trespassing In The Vacant House.

The Court of Appeals held that "no reasonable officer could have concluded that there was probable cause to arrest" Respondents for trespassing in the vacant house. *Wesby v. Dist. of Columbia*, 765 F.3d 13, 19 (D.C. Cir. 2014) ("*Wesby I*"). That erroneous holding creates a dangerous rule inconsistent with this Court's precedent: It precludes officers from relying on objectively reasonable inferences to support probable cause for an arrest if a suspect asserts an innocent mental state.

A. The Totality Of The Circumstances – Including Petitioners' Inferences From Available Facts – Established Probable Cause For Respondents' Arrests.

1. This Court need not break new ground to resolve this case; its existing precedent on probable cause makes plain the panel's error.

Probable cause for an arrest exists "if 'at the moment the arrest was made . . . the facts and circumstances within [the officers'] knowledge and of which

they had reasonably trustworthy information were sufficient to warrant a prudent man in believing'" that the suspect had committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Those facts and circumstances include not just perceivable events and data but also "inferences" that "a police officer may draw . . . based on his own experience in deciding whether probable cause exists," *Ornelas v. United States*, 517 U.S. 690, 700 (1996) – even "inferences and deductions that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411, 418 (1981).

To ensure officers have appropriate case-specific flexibility to draw those inferences, probable cause eschews "rigid rules, bright-line tests, and mechanistic inquiries." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). Probable cause "turn[s] on the assessment of probabilities in particular factual contexts," and the probability of crime is as variable as criminal ingenuity. *Id.* at 1056. Officers thus take an "all-things-considered approach" that "consistently look[s] to the totality of the circumstances." *Id.* at 1055. In each case they assess probable cause guided by "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* (internal quotation marks and brackets omitted). The evidence supporting their assessments – whether perceived or inferred – "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418.

And when assessing probable cause, "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place." *Harris*, 133 S. Ct. at 1055 (brackets omitted). So probable cause for an arrest can exist even if the officer has not yet gathered the quantum of evidence on an element of the crime that "would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972). Indeed, the "Constitution does not guarantee that only the guilty will be arrested." *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

Whether the totality of the circumstances gives an officer probable cause to arrest "generally turns on the 'objective legal reasonableness'" of the arrest. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). After all, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

2. This case could have been easily resolved by applying those straightforward precedents.

Petitioners arrested Respondents for trespassing in a vacant house well past midnight on a Sunday morning. Before they arrested Respondents, Petitioners had talked to the vacant house's owner by phone; the owner told them that *no one* had his permission to be there. Petitioners also called Peaches, whom Respondents claimed had invited them into the vacant house (and had since left). At first Peaches equivocated but eventually she admitted that she lacked authority

to invite Respondents into the house – and then she refused to return there because she did not want to be arrested. Both of those phone calls happened after (1) Petitioners saw Respondents and their co-partiers – some of whom wore garter belts stuffed with money – run for cover when the officers entered the vacant house, which smelled of marijuana smoke; and (2) Respondents told Petitioners conflicting stories about why they were there. Only *after* learning all those facts did Petitioners arrest Respondents for trespassing in violation of D.C. Code § 22-3302.

Under any fair reading of this Court's precedent, those facts created probable cause for Respondents' arrests. No one disputes that Respondents had committed the *actus reus* of trespassing – "that the partiers were on private property without permission from an owner or renter, and without other lawful authority." *Wesby II*, 816 F.3d at 98 (Pillard, J., concurring in den. of reh'g en banc). So the only disputed question is Respondents' mental state – whether there was evidence that Respondents "entered a place they *knew or should have known* was off limits." *Id.*

This Court's cases permit but one answer to that question: The "facts and circumstances" at the time of arrest "were sufficient to warrant a prudent [officer] in believing" that Respondents knew (or should have known) they had no right to be in the vacant house. *Hunter*, 502 U.S. at 228 (internal quotation marks omitted). The homeowner and Peaches had both confirmed to Petitioners that Respondents were unlawfully present; Respondents told inconsistent stories to

explain why they were there; and Respondents ran and hid in closets when Petitioners appeared. Those facts – and Petitioners' inferences from them – established a "probabilit[y] in" this "particular factual context[]" that Respondents knew (or should have known) they lacked permission to be in the vacant house. *Harris*, 133 S. Ct. at 1056.

To be sure, that is not the *only* conclusion that Petitioners could have drawn; Respondents might have been as innocent as they claimed to be. And Petitioners might have determined that Respondents' explanations were reasonable and might have chosen not to arrest them. But that does not mean that Petitioners' decision to arrest was unreasonable. Indeed, "persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent." *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). And "an officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to make an arrest." *Pennsylvania v. Dunlap*, 129 S. Ct. 448, 448-49 (2008) (Roberts, C.J., dissenting from den. of cert.).

That Respondents ultimately were not convicted also does not undermine the conclusion that Petitioners had probable cause to arrest them. The quantum of evidence needed to support a finding of probable cause differs from the quantum of evidence "needed to support a conviction." *Adams*, 407 U.S. at 149. And for more than 200 years the law has been that the former is lower than the latter – "the term 'probable cause' . . .

means less than evidence which would justify condemnation." *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813). So whether Respondents were convicted has no bearing on whether their arrests were lawful.

Because probable cause can exist without officers' ruling out all innocent explanations, "reasonable and prudent people" readily could have found a "fair probability" that Respondents knew or should have known they lacked permission to be in the vacant house. *Harris*, 133 S. Ct. at 1055. That conclusion is entirely reasonable given all the facts and reasonable inferences here. *See Anderson*, 483 U.S. at 639.

B. In Assessing Probable Cause, Officers Can Rely On Reasonable Inferences That Contradict A Suspect's Claims Of An Innocent Mental State.

The Court of Appeals purported to agree with and to apply the legal framework discussed above, yet it reached the opposite conclusion. It held that "*no reasonable officer* could have concluded that there was probable cause to arrest" Respondents for trespassing in the vacant house. *Wesby I*, 765 F.3d at 19 (emphasis added). The court concluded that Petitioners lacked probable cause as a matter of law because the record lacked evidence of Respondents' mental state: *Nothing* suggested that Respondents knew or should have known they lacked permission to be in the vacant house.

The keystone of the Court of Appeals' holding was Peaches' invitation to Respondents. *See id.* at 21. For absent "any conflicting information," the court reasoned, "Peaches' invitation" to Respondents "vitiates the necessary element of" Respondents' "intent to enter against the will of the lawful owner." *Id.* "A reasonably prudent officer aware that" Respondents "gathered pursuant to an invitation from someone with apparent (if illusory) authority *could not conclude* that they had entered unlawfully." *Id.* (emphasis added).

Whatever that rule's logic generally, the Court of Appeals made a crucial legal error in applying it here. It failed to recognize that Petitioners *actually had* "conflicting information" about Respondents' mental state at the time of arrest. That conflicting information was Petitioners' inferences (drawn in light of the facts available to them and their specialized experience and training) about whether Respondents were lying. This Court's probable-cause precedent entitled Petitioners to draw those inferences, based on their specialized training and expertise, and to weigh them with other available facts in determining whether they had probable cause to arrest Respondents. *Ornelas*, 517 U.S. at 700; *Cortez*, 449 U.S. at 418.

But when Petitioners argued that those inferences supported their finding of probable cause, the Court of Appeals dismissed their arguments in a footnote as "beside the point." *Wesby I*, 765 F.3d at 21 n.4. Far from it; those inferences *are* the point. The Court of Appeals' conclusion that the facts here *compelled* Petitioners

to reject their inference that Respondents were lying effectively establishes a new legal rule: A suspect's professed innocent mental state always trumps a trained officer's inferences suggestive of guilt (absent *direct affirmative evidence* contradicting the suspect's statement). In other words, by making officers' reasonable inferences of guilt categorically "beside the point," the Court of Appeals excised an entire class of critical evidence from probable cause's totality-of-the-circumstances calculus. Under the Court of Appeals' new some-of-the-circumstances test, a trained officer's inferences and deductions must yield to a suspect's contrary self-serving assertions, *Ornelas* and *Cortez* notwithstanding.

Judge Brown foresaw how the panel's opinion would change the probable cause assessment. She warned that "officers are simply not required to credit the exonerating statements of suspected wrongdoers where the totality of the circumstances suggests such claims should be treated with skepticism." *Wesby I*, 765 F.3d at 35 (Brown, J. dissenting). "Such a conclusion is not compelled by either our case law or common sense." *Id.*

If this Court nevertheless approves the panel opinion's departure from existing probable cause precedent, it would have vast consequences for the States' law enforcement efforts. This departure from precedent is thus of serious concern to *amici*. To take just one example, criminal trespass statutes in at least twenty-eight states and the Model Penal Code require

proof that a defendant "knowingly" or "willfully" entered into a structure or dwelling without permission.[2]

---

[2] *See* Ala. Code § 13A-7-2(a) (2017) (criminal trespass occurs when a person "knowingly" enters or remains unlawfully in a residential dwelling); Ariz. Rev. Stat. Ann. § 13-1504(A)(1) (2017) (same); Colo. Rev. Stat. § 18-4-502 (2017) (same); Conn. Gen. Stat. § 53a-108(a) (2017) (same); Del. Code Ann. tit. 11, § 822 (2017) (same); Fla. Stat. Ann. § 810.08(1) (2017) (criminal trespass occurs if a person "willfully [enters] or [remains]" in a structure without "being authorized, licensed, or invited"); Ga. Code Ann. § 16-7-21(b)(1) (2017) (prohibiting entry into a premises "knowingly and without authority"); Haw. Rev. Stat. § 708-813(1)(a) (2017) (criminal trespass occurs when a person "knowingly enters or remains unlawfully in a dwelling"); 720 Ill. Comp. Stat. 5/21-3(a)(1) (2017) (same); Ind. Code § 35-43-2-2(b)(5)(B) (2017) (same); Kan. Stat. Ann. § 21-5808(a)(1) (2017) (prohibiting entry into a structure by persons who know they are "not authorized or privileged" to do so); Ky. Rev. Stat. Ann. § 511.060(1) (2017) (prohibiting "knowingly" entering or remaining unlawfully in a dwelling); Me. Rev. Stat. tit. 17-A, § 402 (2017) (same); Miss. Code Ann. § 97-17-93(1) (2017) (trespassing occurs when a person "knowingly enter[s] the lands of another without . . . permission"); Mo. Rev. Stat. § 569.140(1) (2017) ("knowingly" entering or remaining unlawfully in a structure or residence); Mont. Code Ann. § 45-6-203(1) (2017) (same); Neb. Rev. Stat. § 28-520(1)(a) (2017) (same); N.H. Rev. Stat. Ann. § 635:2(I) (2017); N.J. Stat. Ann. § 2C:18-3(a) (2017) (same); N.M. Stat. Ann. § 30-14-1(A) (2017) ("[c]riminal trespass consists of knowingly entering or remaining upon posted private property" without permission); N.Y. Penal Laws § 140.15(1) (Consol. 2017) ("knowingly enter[ing] or remain[ing] unlawfully in a dwelling"); N.D. Cent. Code § 12.1-22-03(1) (2017) (same); Ohio Rev. Code Ann. § 2911.21(A)(1) (2017) (same); 18 Pa. Cons. Stat. § 3503(a)(1)(i) (2017) (same); S.D. Codified Laws § 22-35-5 (2017) ("[a]ny person who, knowing that he or she is not privileged to do so, enters or remains in any building . . . surreptitiously" commits criminal trespass); Wash. Rev. Code § 9A.52.070(1) (2017) (same); W. Va. Code § 61-3B-2 (2017) (same); Wyo. Stat. Ann. § 6-3-303(a) (2017) (same); *accord* Model Penal Code § 221.2 (1981) ("A person commits an offense if, knowing that he is not

An additional two states require proof that a defendant entered "intentionally" or "purposefully."[3] Until now, state courts have not required officers enforcing those statutes to disregard their inferences of wrongdoing when a suspect professes an innocent mental state. *See, e.g.*, *Commonwealth v. Brown*, No. 1394-15-2, 2016 WL 308584, at *1 (Va. Ct. App. Jan. 26, 2016) (mem. op.) (holding that an officer had probable cause to arrest a suspect for trespassing in an apartment complex that had ongoing "problems with trespassing" – even after the suspect told officers that he was visiting "either . . . his sister or his girl" – based on inferences the officer drew because the suspect did not have an exact address for the apartment building he wished to visit, avoided making eye contact, "was 'very nervous'" while talking to the officers, and would not provide the name of the person he was visiting). But such decisions will become rare if this Court agrees with the Court of Appeals that a suspect's self-serving profession of innocence trumps a trained, experienced officer's reasonable inferences.

* * *

---

licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure . . . .").

[3] *See* Ark. Code Ann. § 5-39-203(a)(2) (2017) ("[a] person commits criminal trespass if he or she purposely enters or remains unlawfully in or upon the premises owned or leased by another person."); Wis. Stat. § 943.14 (2017) (a person commits criminal trespass if he or she "intentionally enters or remains in the dwelling of another" without consent).

The Court of Appeals' decision requires officers assessing probable cause to arrest to defer to suspects' statements about their innocent mental state, thereby eliminating from the totality of the circumstances an officer's conflicting inferences. Nothing in the United States Reports supports that approach. This Court should reverse the Court of Appeals' judgment and hold – based on *all* the facts and circumstances, *including* Petitioners' inferences – that Petitioners had probable cause to arrest Respondents for trespassing in the vacant house.

II. Qualified Immunity Shields Petitioners From Liability For Arresting Respondents In The Vacant House.

Even if this Court concludes that Petitioners lacked probable cause to arrest Respondents, it still should reverse the judgment below because Petitioners are entitled to qualified immunity for two reasons. First, the Court of Appeals misapplied this Court's cases extending qualified immunity to officers who reasonably but mistakenly conclude that probable cause supports an arrest. Second, the Court of Appeals erroneously concluded that Petitioners had violated clearly established law. *See Pearson v. Callahan*, 555 U.S. 223, 243 (2009). Neither holding withstands scrutiny.

A. Petitioners' Conclusion That Probable Cause Supported Respondents' Arrests Was Objectively Reasonable, Even If Mistaken.

Law enforcement officers "who 'reasonably but mistakenly conclude that probable cause is present' " and justifies an arrest are entitled to qualified immunity. *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641); *see also Pierson v. Ray*, 386 U.S. 547, 557 (1967). Put differently, this Court's "cases establish that qualified immunity shields" officers "from suit for damages if 'a reasonable officer could have believed' " the arrest " 'to be lawful, in light of clearly established law and the information the arresting officers possessed.' "[4] *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641) (brackets omitted). Because arguable probable cause is an objective inquiry, it "will often require examination of the information possessed by the" arresting officers. *Anderson*, 483 U.S. at 641. But it "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent." *Id.* The officers' "subjective beliefs about the" arrest "are irrelevant." *Id.*

The Court of Appeals misapplied that precedent. It held that qualified immunity did not protect

---

[4] Ten courts of appeals now refer to the *Hunter* rule by the shorthand "arguable probable cause." *See Wesby II*, 816 F.3d at 105-06 (Kavanaugh, J., dissenting from den. of reh'g en banc). "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Garcia v. Jane & John Does 1-40*, 779 F.3d 84, 92 (2d Cir. 2015) (citations omitted).

Petitioners because their conclusion that they had probable cause to arrest Respondents in the vacant home was *unreasonable* as a matter of law. *See Wesby I*, 765 F.3d at 26-27. In doing so, the court paid lip service to *Hunter*'s objective-reasonableness rule, but it effectively rewrote *Hunter* to create a subjective-reasonableness test when criminal suspects give officers excuses tending to negate a culpable mental state. *See Wesby II*, 816 F.3d at 101 (Pillard, J., concurring in den. of reh'g en banc).

In particular, when concurring in the denial of Petitioners' en banc petition, the panel opinion's author explained that under her opinion, whether an objectively reasonable officer could have doubted the truthfulness of the suspects' excuses is irrelevant to determining probable cause to arrest; what really matters is whether the "officers *actually doubt* a suspect's credibility." *Id.* at 100 (Pillard, J., concurring in den. of reh'g en banc) (emphasis added). So only an officer's subjective "actual[] doubt[s]" arising from potentially bogus excuses can constitute "conflicting information" about a suspect's *mens rea* worthy of an officer's taking "into account when assessing whether the totality of the circumstances support probable cause." *Id.*

That reasoning turns on its head the bedrock rule that qualified immunity "turns on the 'objective legal reasonableness' of the" arrest. *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819). Objective tests ask what "a reasonable officer *could have believed*," *id.* at 641; what these *specific* officers "actually" believed, *Wesby II*, 816 F.3d at 100 (Pillard, J., concurring in

den. of reh'g en banc), matters not at all. Any fair application of arguable probable cause thus must include the judgments and conclusions an objectively reasonable officer *could have drawn* from a suspect's excuses – based on his training and experience – within the totality of the circumstances, *regardless* of whether the specific officers *actually* reached those conclusions. Yet the Court of Appeals walled off those considerations from arguable probable cause's totality-of-the-circumstances calculus here because, in its view, Petitioners did not personally reach them.[5]

That never has been the law. Quite the contrary: All eleven courts of appeals that have addressed the issue (including a prior D.C. Circuit opinion) have held that judgments a reasonable officer *could have reached* about the suspect's truthfulness necessarily form part of the totality of the circumstances when assessing arguable probable cause to arrest for a mens rea crime. Or, in other words, that both a suspect's excuses *and* (even contradictory) inferences a reasonable officer could have drawn from them are relevant to assessing arguable probable cause. *See Wesby II*, 816 F.3d at 107-08 (Kavanaugh, J., dissenting from den. of reh'g en banc) (citing cases); *see also Garcia v. Jane & John*

---

[5] The Court of Appeals' conclusions about Petitioners' subjective beliefs are flawed in their own right. They are based on a contested reading of D.C. law and on inferences from the evidence drawn against Petitioners, contrary to Rule 56's command that inferences are to be drawn in the non-moving party's favor. Petitioners did not need to introduce evidence of their subjective beliefs in any event; such evidence is irrelevant under this Court's qualified-immunity precedent.

Does 1-40, 779 F.3d 84, 93 (2d Cir. 2015) ("It is well established that a police officer aware of facts creating probable cause to suspect a prima facie violation of a criminal statute is 'not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.'"); *Finigan v. Marshall*, 574 F.3d 57, 63 (2d Cir. 2009) (holding that officers need not sit as prosecutor, judge, or jury because "[t]heir function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of evidence") (citation omitted).

Two cases from other circuits show how the Court of Appeals should have resolved this case. First, in *Painter v. City of Albuquerque*, 383 F. App'x 795 (10th Cir. 2010), the court affirmed a judgment granting qualified immunity to officers who arrested a suspect on suspicion of cashing a fraudulent check despite the suspect's claim that "the officers lacked probable cause . . . because they had no reason to believe he possessed the requisite mental state, or mens rea." *Id.* at 799 (Gorsuch, J.). Writing for the panel, then-Judge Gorsuch reasoned that "the facts known to the officers here, while not pointing uniformly in the same direction or metaphysically dispositive of [the suspect's] intent, were sufficient for an objectively reasonable officer to think that [the suspect] *probably* harbored the intent to cash a check he knew not to be valid." *Id.* at 800.

Second, in *Borgman v. Kedley*, 646 F.3d 518 (8th Cir. 2011), an officer was called to the Wild Rose Casino by casino staff and asked to arrest the plaintiff for

trespassing. The plaintiff, a problem gambler, had previously signed a voluntary exclusion order at the Mississippi Belle – a different casino that the Wild Rose had purchased – warning her that she would be trespassing if she entered the Mississippi Belle "and all of its . . . assigns" at any future point. *Id.* at 520-21. The Wild Rose was an "assign" of the Mississippi Belle. *Id.* at 521.

When the officer arrived, security staff told him that the plaintiff had stated she was not aware that the Wild Rose was an "assign" of the Mississippi Belle and thus that she lacked the *mens rea* for trespassing. *Id.* at 521. The officer knew of no evidence controverting the plaintiff's statement about her mental state, but he still arrested her for criminal trespass. *Id.* at 522. The criminal case was dismissed and the plaintiff filed a claim under 42 U.S.C. § 1983 for false arrest.

The Eighth Circuit held that the officer was entitled to qualified immunity because probable cause supported the arrest for trespassing. It stated that "[a]n officer can rely on 'the implications of the information known to him' when assessing whether a suspect possessed the state of mind required for the crime." *Id.* at 524. The court further held that "[i]t is usually not possible for an officer to be certain about a suspect's state of mind at the time for a criminal act, but *he need not rely on an explanation given by the suspect.*" *Id.* (citation omitted; emphasis added). "Viewing the facts in the light most favorable to" the suspect (as the party not seeking summary judgment) "means only that the

court must accept that she emphatically denied knowing that she was trespassing, *but does not mean that a reasonable officer would have believed her.*"[6] *Id.* (emphasis added).

Had the Court of Appeals followed the reasoning in *Painter* and in *Borgman*, it would have held that Petitioners "are entitled to qualified immunity because they at least *reasonably could have believed* that they had probable cause" to arrest Respondents. *Wesby II*, 816 F.3d at 105 (Kavanaugh, J., dissenting from den. of reh'g en banc) (emphasis in original). Respondents' conflicting excuses could have given an objectively reasonable officer ample reason to question Respondents' *mens rea* – especially when viewed in the context of the full panoply of facts Petitioners already knew when they arrested them. So under a straightforward application of this Court's precedent, Petitioners are entitled to qualified immunity: They *at least* had arguable probable cause to arrest Respondents.

---

[6] *See also, e.g., Luzzi v. Hirsch*, No. 3:10CV481, 2011 WL 6780968, at *5 (D. Conn. Oct. 20, 2011) (granting summary judgment to officers who arrested hunter for trespass and holding that although *mens rea* was an element of the crime, "[i]t is irrelevant here"); *Newsome v. Whitaker*, No. Civ.A.03-3182, 2005 WL 525398 (E.D. Pa. Mar. 4, 2005) (granting summary judgment to officers where plaintiff claimed he was entitled to be on premises where he was arrested for criminal trespass).

B. The Cases That Squarely Govern Petitioners' Conduct Did Not Put Them On Notice That Respondents' Arrests In The Vacant House Violated Clearly Established Law.

Petitioners are also entitled to qualified immunity for the separate reason that the law upon which the panel majority relied to strip them of qualified immunity – its novel, erroneous view of probable cause – was not clearly established. "An officer conducting [an arrest] is entitled to qualified immunity where clearly established law does not show [the arrest] violated the Fourth Amendment." *Pearson*, 555 U.S. at 243-44.

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson*, 483 U.S. at 635). The official action's unlawfulness "must be apparent . . . in the light of preexisting law." *Anderson*, 483 U.S. at 640 (citations omitted). The right cannot be defined "'at a high level of generality'" but "must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *al-Kidd*, 563 U.S. at 742; *Anderson*, 483 U.S. at 640).

To be sure, the panel opinion's author disputed the dissenting judges' conclusion that the opinion applies a new rule, downplaying its disagreement about the outcome here as "entirely fact-bound." *Wesby II*, 816

F.3d at 101 (Pillard, J., concurring in den. of reh'g en banc) (internal quotation marks omitted). But this *post-hoc* justification actually proves otherwise.

The Court of Appeals cited no case with the "particularized" holding that inferences or conclusions an objectively reasonable officer *could have drawn* from the totality of circumstances to support probable cause must be *excluded* from that calculus when (1) a suspect's *mens rea* is an element of the crime, (2) the suspect offers an innocent explanation for his conduct, and (3) the officer subjectively did not doubt those explanations. There is no Supreme Court case so holding. And *amici* have not found a controlling D.C. Circuit case, or a "'robust consensus of cases of persuasive authority'" standing for such a proposition (to the extent that such cases constitute "clearly established" law). *City & Cnty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1778 (2015) (quoting *al-Kidd*, 563 U.S. at 742); *see also Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (assuming "arguendo" that a Court of Appeals' controlling authority could be "a dispositive course of clearly established law").

The absence of such authority is not surprising: The panel majority's view contradicts the apparently otherwise uniform view of the courts of appeals. *See Sheehan*, 135 S. Ct. at 1778 (noting that the "opposite" of a "consensus of cases of persuasive authority" cannot clearly establish law). A suspect's "'innocent explanations for his odd behavior cannot eliminate the suspicious facts from the probable cause calculus.'" *Sennett*

v. United States, 667 F.3d 531, 536 (4th Cir. 2012) (quoting *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009)). That's because "[t]he test [for probable cause] is not whether the conduct under question is consistent with innocent behavior; law enforcement officers do not have to rule out the possibility of innocent behavior." *Id.* (quoting *Ramirez*, 560 F.3d at 1024); *see also Wesby II*, 816 F.3d at 107-08 (Kavanaugh, J., dissenting from den. of reh'g en banc) (citing cases).

As a result, whatever else might be said about the panel majority's view, "one thing is crystal clear: No decision prior to the panel opinion here had prohibited arrest under D.C. law in these circumstances." *Id.* at 111 (Kavanaugh, J., dissenting from den. of reh'g en banc). On the contrary – applicable D.C. Court of Appeals case law "clearly *permits* police officers to arrest a person for trespassing even when that person claims to have the right to be on the property, if a reasonable officer could disbelieve the suspected trespasser." *Id.*; *see also id.* at 109 (citing *Artisst v. United States*, 554 A.2d 327 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90 (D.C. 1967)). "It is especially troubling that the [D.C.] Circuit would conclude that [Petitioners were] plainly incompetent – and subject to personal liability for damages – based on actions that were lawful according to courts in the jurisdiction where [they] acted." *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013).

So "[t]his should have been a fairly easy case for qualified immunity." *Wesby II*, 816 F.3d at 111 (Kavanaugh, J., dissenting from den. of reh'g en banc). Regrettably, the panel majority did what this Court "has

repeatedly told [it] not to do" – "create[] a new rule and then appl[y] that new rule retroactively against the police officers." *Id.* at 111 (Kavanaugh, J., dissenting).

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
**Counsel of Record*
KYLE J. KAISER
MEB W. ANDERSON
Assistant Attorneys General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov

Counsel for Amicus Curiae
State of Utah

ADDITIONAL COUNSEL

STEVEN T. MARSHALL
Attorney General
STATE OF ALABAMA

LESLIE RUTLEDGE
Attorney General
STATE OF ARKANSAS

DOUGLAS S. CHIN
Attorney General
STATE OF HAWAII

LISA MADIGAN
Attorney General
STATE OF ILLINOIS

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA

DEREK SCHMIDT
Attorney General
STATE OF KANSAS

ANDY BESHEAR
Attorney General
COMMONWEALTH OF KENTUCKY

JEFF LANDRY
Attorney General
STATE OF LOUISIANA

BRIAN E. FROSH
Attorney General
STATE OF MARYLAND

BILL SCHUETTE
Attorney General
STATE OF MICHIGAN

JIM HOOD
Attorney General
STATE OF MISSISSIPPI

DOUG PETERSON
Attorney General
STATE OF NEBRASKA

ADAM PAUL LAXALT
Attorney General
STATE OF NEVADA

GORDON J. MACDONALD
Attorney General
STATE OF NEW HAMPSHIRE

CHRISTOPHER S. PORRINO
Attorney General
STATE OF NEW JERSEY

MICHAEL DEWINE
Attorney General
STATE OF OHIO

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA

ELLEN F. ROSENBLUM
Attorney General
STATE OF OREGON

JOSH SHAPIRO
Attorney General
COMMONWEALTH OF
PENNSYLVANIA

PETER F. KILMARTIN
Attorney General
STATE OF RHODE ISLAND

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA

HERBERT H. SLATERY III
Attorney General
STATE OF TENNESSEE

KEN PAXTON
Attorney General
STATE OF TEXAS

PATRICK MORRISEY
Attorney General
STATE OF WEST VIRGINIA

BRAD D. SCHIMEL
Attorney General
STATE OF WISCONSIN